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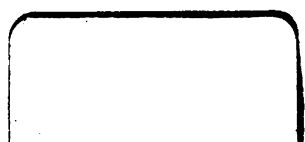
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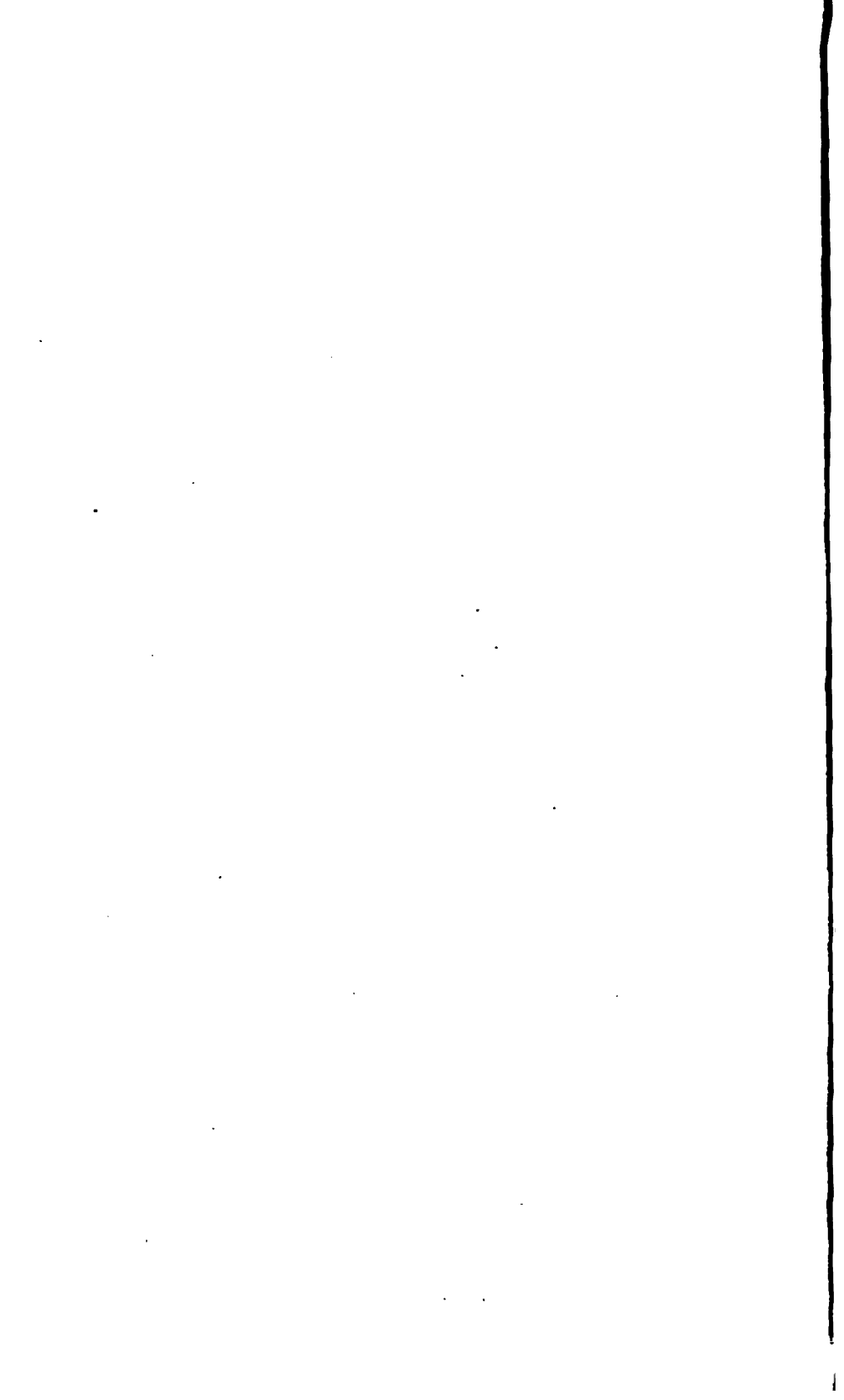
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THE
AMERICAN AND ENGLISH
RAILROAD CASES.

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND.

EDITED BY
WILLIAM M. MCKINNEY,

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THE
AMERICAN AND ENGLISH
RAILROAD CASES.

VOLUME XLVII.

NORFOLK & WESTERN R. CO.

v.

COMMONWEALTH.

(Virginia Supreme Court of Appeals, June 25, 1891.)

Sunday Trains—Statute Forbidding—Interstate Commerce.—A statute (Code Va. § 3801) which forbids the running of trains between sunrise and sunset on a Sunday, except such as are used exclusively for the relief of wrecked or disabled trains, or for the transportation of the mails, passengers, live-stock, or articles of such perishable nature as would be necessarily impaired in value by one day's delay, is, in so far as it forbids the running of trains between points in different states, an attempt to regulate commerce among the states, and is, therefore, in conflict with the federal constitution and void.

ERROR to judgment of the circuit court of Pulaski county, rendered March 25, 1891, affirming a judgment of the county court of that county against the Norfolk & Western Railroad Company in a prosecution for a misdemeanor. The indictment was for running a train of cars on Sunday, contrary to the act of March 19, 1884, now carried into § 3801 of the Code. That act forbids the running of trains between sunrise and sunset on a Sunday, except such as are used exclusively for the relief of wrecked or disabled trains, or for the transportation of the United States mails, passengers, live-stock, or articles of such perishable nature as would be necessarily impaired in value by one day's delay in their passage. Section 5258, Rev. St. U. S., however, (not noted in the indictment), makes every railroad in the country, operated by steam, an agency of commerce for the transportation, among other things, of "freights on their way from one state to another state." There was a motion to quash the indictment,

on the ground that it was not sufficiently certain,—that is to say, that, even admitting the charge in the indictment to be true, the defendant was not necessarily guilty of any offense under the laws of the land; which motion was overruled, whereupon the defendant pleaded not guilty. The facts were argued at the trial, and are as follows: That on Sunday, the 21st day of September, 1890, the defendant by its agents and employes, ran over the New River Division of its road, in Pulaski county, after 9 o'clock in the morning, and before sunset, a train of cars loaded with coal and coke, which was being transported from Bluefield, a station on defendant's road, in the state of West Virginia, into and through Virginia, and that said train was being run only for the transportation of said coal and coke. The defendant demurred to the evidence, whereupon the jury conditionally assessed the fine of \$50. The county court overruled the demurrer, and rendered a judgment for the fine assessed, which judgment was afterwards affirmed by the circuit court.

Phlegar & Johnson and Brown & Moore, for plaintiff in error.
The Attorney General, for the Commonwealth.

LEWIS, P.—The defendant's contention on the merits in the trial court, and here is that the statute upon which the indictment was founded is, so far as it applies to a case like the present, repugnant to the constitution of the United States, which gives to congress the power to regulate commerce among the several states. The precise propositions contended for on this point are: (1) That the act of transportation mentioned in the proceedings was commerce between the states; (2) that such commerce is, as to all matters that admit of uniformity of regulation, subject only to congressional regulation; (3) that § 3801 of the Code is a regulation of commerce; and (4) that as such, it cannot be applied to interstate commerce, or to the train in question.

It is an historical fact, well known, that to secure uniformity and freedom in commercial intercourse, and, with that view, to establish a single government empowered to regulate commerce, was the chief consideration that led to the formation and adoption of the federal constitution. Accordingly, that instrument ordains that "congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Article I, § 8. The power thus conferred, as the supreme court of the United States has repeatedly decided, is complete and exclusive. It is the unlimited power, in other words, to prescribe rules by which commerce shall be governed, and

Question presented.

Interstate commerce exempt from state regulations.

to determine how far it shall be free and untrammelled. Any attempt, therefore, by a state to regulate foreign or interstate commerce is the attempted exercise of a power which has been surrendered by the states, and granted exclusively to the national government. It is an attempt to do that which congress alone is authorized to do, and hence is a nullity. As was said in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465: "Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution to congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive." And in a subsequent part of the same opinion it was said that transportation is not only essential to commerce, but that it is commerce itself, and that every obstacle to it, or burden laid upon it, by legislative authority is regulation. See, also, *County of Mobile v. Kimball*, 102 U. S. 691; *McCall v. California*, 136 U. S. 104, 45 Am. & Eng. R. Cas. 1: "It cannot be too strongly insisted upon," said the court in *Wabash, etc. R. Co. v. Illinois*, 118 U. S. 557, 26 Am. & Eng. R. Cas. 1: "that the right of continuous transportation from one end of the country to the other is essential, in modern times, to that freedom of commerce from the restraints which the states might choose to impose upon it that the commerce clause of the constitution was intended to secure; and it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states, which was deemed essential to a more perfect union by the framers of the constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of the transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce." And in a still more recent case it was remarked that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489, 16 Am. & Eng. R. Cas. 1. There is, indeed, what has been termed a kind of neutral ground which may be constitutionally occupied by the state, so long as it interferes with no act of congress. Thus, where the subject is local in its nature or sphere of operation, such as the establishment of highways, the construction of bridges over navigable streams, the regulation of harbor pilotage, the erection of wharves, piers, and docks, in these and other like

cases, which are considered as mere aids rather than regulations of commerce, the state may act until congress supersedes its authority; but where the subject is national in its character, admitting of uniformity of regulation, such as the transportation and exchange of commodities between the states, congress alone can act upon it. The case of *Cooley v. Port Wardens*, 12 How. 299, is sometimes cited as an authority to the contrary: that is, for the proposition that, in the absence of congressional action, a state may regulate interstate commerce within its own territorial limits. But this statement is broader than the decision justifies; for it was expressly said in that case that "whatever subjects of this power are in their nature national, or admit of only one uniform system or plan of regulation, may be justly said to be of such a nature as to require exclusive legislation by congress." And in the very recent case of *Leisy v. Hardin*, 135 U. S. 100, known as the "Original Package Case," where the subject is fully considered, Mr. Chief Justice FULLER, in delivering the opinion of the court, used the following language: "The power to regulate commerce among the states is a unit, but, if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them with a view to local needs and circumstances until congress otherwise directs; but the power thus exercised by the states is not identical in its extent with the power to regulate commerce among the states. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belong to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and welfare of society, originally necessarily belonging to, and upon the adoption of the constitution reserved by, the states, except so far as falling within the scope of a power confided to the general government." But these powers, it was said, "though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of congress in effectuation of the general power." And in the same case the principle was again announced, as it had often been before, that the transportation of passengers or of merchandise from one state to another is in its nature not local, but national, and therefore admitting of but one regulating power.

These authorities, which are only a few of many that might be cited to the same effect, are sufficient to show the invalid-

ity of legislation by the states in regard to subjects of commerce which are in their nature national, no matter what may be the avowed object of such legislation, and that nothing is gained by calling it the "police power." The subject was elaborately discussed, and with his accustomed force, by Mr. Justice MILLER in *Henderson v. Mayor of N. Y.*, 92 U. S. 259, where it was declared that, however difficult it may often be to distinguish between one class of legislation and another, it is clear, from our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to congress it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states. In *Railroad Co. v. Husen*, *supra*, it was said: "We admit that the deposit in congress of the power to regulate foreign commerce, and commerce among the states, was not a surrender of that which may properly be denominated 'police power.' What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. * * But whatever may be the nature and reach of that power," it was added, "it cannot be exercised over a subject confided exclusively to congress by the federal constitution. It cannot invade the domain of the national government." Nor does it matter, in such a case, that congress has not acted; for it is now settled that the silence of congress is not only not a concession that the powers reserved by the states may be exerted as if the specific power had not been elsewhere reposed, but on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. "Hence," as was decided in *Leisy v. Hardin*, following many previous decisions, "inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelled." In *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 45 Am. & Eng. R. Cas. 9, the court, in an opinion by Mr. Justice LAMAR, said: "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state,

and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transaction, it is subject to the regulation of congress." It is also a well-established principle that an article of commerce transported from one state to another is protected by the constitution against interfering state legislation until it has mingled with, and become a part of, the common mass of property within the latter state ; and, if this be so, *a fortiori* is it protected while *in transitu*. *Brown v. Maryland*, 12 Wheat. (U. S.), 419; *Welton v. Missouri*, 91 U. S. 275 ; *Leisy v. Hardin*, 135 U. S. 100. Tested by these principles, which are axiomatic, it is clear that the judgment complained of is erroneous.

That the transportation of the coal and coke mentioned in the proceedings was an act of commerce, national in its character, is too plain, to admit of doubt ; and it is equally clear that the legislation in question, in so far as it extends to a case like the present, is unwarranted and void. A statute which forbids the running of interstate freight trains between sunrise and sunset on a Sunday is by its necessary operation, no matter what its professed object may be, a regulation of commerce. At all events it is an obstruction to interstate commerce which for the purposes of the present case amounts to the same thing ; for, in any view, it is an invasion of the exclusive domain of congress, and therefore void. To say that the state may, in the exercise of her police powers, enforce by statute the observance of the Sabbath, not as a religious duty, but as a day of rest, is no answer to the constitutional objection here raised. The validity of such legislation, when not in conflict with a higher law, is acknowledged by all, and its wisdom and propriety denied by none, certainly not by this court. But when, in a case like the present, it contravenes the constitution of the United States, the latter must prevail, because it is "the supreme law," in all matters relating to the regulation of interstate commerce. Such a statute, if passed by congress, so far as it concerns foreign or interstate commerce, would be valid, not however, as the exercise of police power, but as the regulation of commerce ; and the reason which would make such legislation valid as an act of congress makes it invalid as an act of a state legislature. As to the effect of the statute in question, if sustained, upon the commercial interests of the country, we need not stop to inquire. It is enough to say that to the extent indicated, it is not valid. In *Henderson v. Mayor of N. Y.*, *supra*, it was decided that, whatever may be the nature and extent of the police power of the state, "no definition of it, and no urgency for

The statute
void as a regu-
lation of com-
merce.

its use, can authorize a state to exercise it in regard to a subject matter which has been confined exclusively to the discretion of congress by the constitution." This principle was reaffirmed in *Leisy v. Hardin*, where it is said that such a subject matter is not within the police power of a state, unless placed there by congressional action; and the observations of Mr. Justice MATTHEWS in *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 23 Am. & Eng. Corp. Cas. 236, were quoted in the opinion, to the effect that, in view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several states of the union, it cannot be supposed that the constitution or congress have intended to limit the freedom of commercial intercourse among the people of the several states. The fact, if it be a fact, that the statute in question was not intended as a regulation of commerce, does not, we repeat, affect the case. There may be no purpose, it has been held, upon the part of a legislature, to violate the constitution, and yet a statute enacted under the forms of law, may by its necessary operation, injuriously affect rights secured by the constitution, in which case the statute, to that extent, must be declared void. *Brimmer v. Rebman*, 138 U. S. 78. This is merely stating in different form the proposition affirmed in the *Henderson Case*, namely, that, in whatever language a statute may be framed, its constitutional validity must be determined by its natural and reasonable effect,—a proposition that would seem to be incontrovertible. In the last mentioned case, a statute of New York which required the master or owner of every vessel landing passengers at the port of New York from a foreign country to give a bond in a prescribed penalty for each passenger so landed, as an indemnity against any expense to be incurred by the state or city for the support of such passengers, was held void, as being a regulation of commerce, although it was sought to be sustained as a police regulation to protect the state against the influx of paupers; the practical result of the statute being to impose a burden upon all passengers so landed from a foreign country. So, in the case of *Chy Lung v. Freeman*, 92 U. S. 275, a similar statute of California, intended to prevent the introduction of lewd women into that state, was held void, as going beyond the necessity of the case, and amounting, in its practical operation, to a regulation of foreign commerce. Upon the same principle, statutes prohibiting the introduction of intoxicating liquors into the state enacting them have been held to be infringements of the commerce clause of the constitution, and not valid police regulations to guard against the evils of intemperance. And numerous illustrations of the same principles

are to be found in the adjudged cases, all of which show that when, in the attempted exercise of the police power, no matter upon what grounds it is sought to be exercised, the action of a state comes in conflict with a power vested exclusively by constitution in congress, such attempt is a nullity; and the present case comes within this principle.

The power of the state to enforce observance of the Sabbath as a police regulation stands upon no higher footing than her power to guard against the evils of vice or intemperance, or of imported pauperism, or infectious diseases. In either case the nature and extent of the power is exactly the same, and there is no principle for holding otherwise. Our attention has been called, in this connection, to *State v. Baltimore & O. R. Co.*, 24 W. Va. 783, 18 Am. & Eng. R. Cas. 466, wherein a "Sunday law," so called, similar to the one we are considering, was upheld, under circumstances resembling those of the present case. The court in that case admitted that the transportation between the states, is commerce between the states, and that such commerce is necessarily under the exclusive control of congress; but it denied that non-action by congress is equivalent to a declaration that such commerce shall be free and untrammelled, and upon that ground sustained the statute *in toto*. As to the last proposition, we have already shown by the cases referred to—some of them decided since that case was decided—that the rule is otherwise, and, after a careful examination of the case, we find nothing in it to raise a doubt that the rule has been rightly settled. The judgment must therefore be reversed, and the defendant discharged from further prosecution under this indictment, which ought to have been quashed.

LACY, J., (*dissenting*).—This is a writ of error to a judgment of the circuit court of Pulaski county rendered at the March term, 1891, when the circuit court affirmed the judgment of the county court, rendered at the February term, 1891, of said county court, where the plaintiff in error was convicted for a violation of the Sunday laws of this commonwealth, and adjudged to pay a fine of \$50. It is admitted that the said plaintiff in error openly violated the law of the state, upon the ground that it is in violation of the constitution of the United States, because it is an interference by the state with the subject of commerce among the states; that the constitution of the United States provides (article 1, § 8), that the congress shall have power to regulate commerce with foreign nations, and among the states, and with the Indian tribes. Our Code provides that "if a person, on a

Power to enforce observance of Sabbath.

Case stated.

Sabbath day, be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except in household or other work of necessity or charity, he shall forfeit two dollars for each offence. Every day any servant or apprentice is so employed shall constitute a distinct offense." Code Va. § 3799. This plaintiff in error is a domestic corporation, domiciled within the state of Virginia, holding its chartered rights under the grant of the state, whose charter, by its express terms, provides that it may be altered, modified, or repealed by any future legislature as may think proper. *Id.* § 1240. The absolute prohibition against laboring at its calling being, in the legislative mind, inexpedient in its application to this or other domestic corporations, the legislature, in 1884, enacted a statute which modified the general law, and excepted such trains as were loaded with passengers and perishable freight, and which suffer injury by delay, and provided as follows: "No railroad company, receiver, or trustee controlling or operating a railroad shall, by any agent or employe, load, unload, run, or transport upon such road on a Sunday any car, train of cars, or locomotive, nor permit the same to be done by any such agent or employe, except when such cars, trains, or locomotives are used exclusively for the use of wrecked trains, or trains so disabled as to obstruct the main track of the railroad, or for the transportation of the United States mail, or for the transportation of passengers and their baggage, or for the transportation of live stock, or for the transportation of articles of such perishable nature as would be necessarily impaired in value by one day's delay in their passage: provided, however, that, if it should be necessary to transport live stock or perishable articles on a Sunday to an extent not sufficient to make a whole train load, such train load may be made up with cars loaded with ordinary freight." Section 3803 provides that "the word 'Sunday,' in the preceding section, shall be construed to embrace only that portion of the day between sunrise and sunset; and trains *in transitu* having started prior to twelve o'clock on Saturday night may, in order to reach the terminus or shops of the railroad, run until nine o'clock the following Sunday morning, but not later." Section 3802 provides the penalty, which is immaterial in this case; the fine assessed not being in violation thereof. These sections constitute our Sunday laws, not very stringent, it must be admitted, as far as railroads are concerned; its extreme liberality in the privileges to labor on the Sabbath accorded therein suggesting the thought that, when the law was drawn, the railroads in some form stood by consenting, but how this is I have no information. However that may be, the law is

now obnoxious to the railroad in question, and in some localities the lower courts have refused to enforce the law.

The question now to be inquired into is what is the nature of this law? Is it an act to regulate commerce with foreign nations, or among the states, or with the Indian tribes? And does it thus invade the granted powers of the congress, under the constitution of the United States, and conflict with them? If so, it cannot be upheld. It certainly was not so intended.

Nothing is said about commerce nor about transportation between the states. It is absolutely limited in its operation to the state of Virginia. It is to be found in the chapter of our Code entitled "Of offenses against morality or decency; protection of religious meetings." The section which precedes it is entitled "Profane swearing and drunkenness, how punished." The section which succeeds it is entitled "Sale of intoxicating liquors on Sunday, how punished." The next is, "Disturbance of religious worship, how punished." It is intended as an exercise of the police power of the state, in the interest of morality and decency, and that is what I think it is. It is no part of the province of congress, under its granted powers, to enact police laws for the regulation of such affairs within a state; and if this state may not enact, for the protection of its citizens, police laws for the observance of the Sabbath day, we must ever remain practically without such. I think I am sustained in this view by the decision of the courts of this country, both state and federal; and I will briefly proceed to consider this. Commerce consists of the

**Regulations
of commerce
and police
regulations
disting-
guished.**

various agreements which have for their object facilitating the exchange of the products of the earth, or the industry of man, with the intent to realize a profit. Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation of persons and property, as well as the purchase, sale, and exchange of commodities. The power conferred upon the congress by the above clause is exclusive, so far as it relates to matters within its purview which are material in their character, and admit of a requisite uniformity of regulation affecting all the states. That clause was adopted in order to secure uniformity against discriminating state legislation. State legislation is not forbidden in matters either local in their operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbors, pilotage, beacons, buoys, and other improvements of harbors, bays, and rivers within a state, if their free navigation be not thereby

impaired. Congress, by its inaction in such matters, virtually declares that until it deems best to act they may be controlled by the state. *County of Mobile v. Kimball*, 102 U. S. 691 (opinion of Mr. Justice FIELD.) In the case of *Sherlock v. Alling*, 93 U. S. 99, the same learned justice said: "In supposed support of this position, numerous decisions of this court are cited by counsel to the effect that the states cannot by legislation place burdens upon commerce with foreign nations or among the several states." Upon an examination of these cases, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuits in particular channels, or conditions for carrying it on. Thus, in the *Passenger Cases*, reported in 7 How. (U. S.), 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In *Pennsylvania v. Wheeling & B. Bridge Co.*, reported in 13 How. (U. S.), 518, the statute of Virginia authorized the erection of a bridge which was held to obstruct the free navigation of the river Ohio. And in all the other cases, when legislation of a state has been held to be null for interfering with the commercial power of congress—as in *Brown v. Maryland*, 12 Wheat. (U. S.), 425; *Tax Cases*, 12 Wall. (U. S.), 204; and in *Welton v. Missouri*, 91 U. S. 275—the legislation created in the way of tax, license, or condition a direct burden upon commerce, or in some way directly interfered with its freedom; and it may be said generally that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land, or engaged in commerce, foreign or interstate, or in any other pursuit. Judge Cooley says, in his work on *Constitutional Limitations* (page 722:): "The line of distinction between that which constitutes an interference with commerce and that which is a mere police regulation is sometimes dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that congress has the power to go beyond the general regulations of commerce which it is ac-

customed to establish, and to descend to the most minute directions, if it shall be deemed advisable: and that to whatever extent ground shall be covered by these directions the exercise of state power is excluded.

Congress may establish police regulations as well as the states, confining their operations to the subjects over which it is given control by the constitution. But as the general police power can better be exercised under the supervision of the local authorities, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations that are made by congress do not often exclude the establishment of others by the state covering very many particulars. Moreover, the regulations of commerce are usually, and in some cases must be, general and uniform for the whole country; while in some localities state and local policy will demand peculiar regulations with reference to special and peculiar circumstances." In the late case of *Cardwell v. American River Bridge Co.*, 113 U. S. 205, after citing the earlier cases, the court said that they illustrate the general doctrine, now fully recognized, that the commercial power of congress is exclusive of state authority only when the subjects upon which it is exerted are national in their character, and admit and require uniformity of regulations affecting all the states; and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation and management until congress interferes and supercedes their action. I will cite as an illustration of my view of this subject yet another decision of the supreme court of the United States upon this subject, which applies to a through line of railway, and is much in point. In the case of *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 23 Am. & Eng. R. Cas. 577, (one of the Railroad Commission Cases), that court said: "There can be no doubt that each of the states through which the Mobile & Ohio R. R. passes incorporated the company for the purpose of securing the construction of a continuous line of interstate communication between the Gulf of Mexico, in the south, and the Great Lakes, in the north. It is equally certain that congress aided in the construction of parts of this line of road, so as to establish such a route of travel and transportation; but it is none the less true that the corporation created by each state is, for the purposes of local government, a domestic corporation, and that its railroad within the state is a matter of domestic concern. Mississippi may govern this corporation as it does all domestic corporations, in respect to every act, and everything within the state which is the lawful subject of state government. It may, beyond all question,

by the settled rule of decision of this court, regulate freights and fares for business done exclusively within the state; and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence, etc., as much of its road as lies within the state, to stop its trains at railroad crossings, to slacken speed while running in a crowded thoroughfare, to put its tariffs and time-tables at proper places, etc. This company is not entirely relieved from state control in Mississippi, simply because it has been incorporated by, and is carrying on business in, the other states through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the constitution of the United States within the exclusive jurisdiction of congress. It is not enough to prevent the state from acting that the road in Mississippi is used in aid of interstate commerce. Legislation of this kind, to be unconstitutional, must be such as will necessarily amount to or operate as a regulation of business without the state as well as within." See, also, *Smith v. Alabama*, 124 U. S. 465, 33 Am. & Eng. R. Cas. 425; *Nashville C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 38 Am. & Eng. R. Cas. 1; *Chicago & A. R. Co. v. People*, 105 Ill. 657, 12 Am. & Eng. R. Cas. 156; *Rae v. Grand Trunk R. Co.*, 14 Fed. Rep. 401, 9 Am. & Eng. R. Cas. 470; *Iowa v. Chicago, M. & St. P. R. Co.*, 33 Fed. Rep. 391; *Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. Rep. 849. And as to the right of the state to regulate the charge for taking on through cars—"switching" as it is called—by a state commission, it was held to have no reference to interstate commerce, in the case of *Railroad Co. v. Becker*, *supra*. And again it was held in the state of Iowa *v. Chicago, M. & St. P. R. Co.*, 33 Fed. Rep. 391, that, even if such switching be an act of interstate commerce, such regulation is valid, as it does not refer to the carriage of freight outside the state. And, again, it was said by the supreme court of the United States in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 13 Am. & Eng. Corp. Cas. 365, that the power to prescribe regulations to protect the health of the community, and to prevent the spread of disease, is incident to all local municipal authority, however much such regulation may interfere with interstate commerce. The interstate commerce act itself, passed February 4, 1887, and amended March 2, 1889, when congress subjected to its control all common carriers engaged in continuous interstate or international transportation of passengers or property, was

held not to include the carriage or handling of passengers, by rail or otherwise, when such carriage or handling is performed wholly within a state. *Ex parte Koehler*, 30 Fed. Rep. 867, 30 Am. & Eng. R. Cas. 71. This is the result of all the decisions of the federal courts. If the act in question only applies to and operates upon transportation within the state, it is immaterial that the company operated on is part of an interstate line. It must not only affect commerce, but it must affect commerce with foreign nations, or among the states, or with the Indian tribes. But, if the act is one done in the exercise of a police power, it is within the legitimate and unchallenged domain of the state; such as to regulate concerning the public health, public peace, and morality and decency.

Now, what is this police power, and where does it reside? It is defined to be the authority to establish, for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others, and is usually spoken of as the authority or power of police. This is a most comprehensive branch of sovereignty, extending, as it does, to every person, every public and private right, everything in the nature of property, every relation in the state, in society, and in private life. The power vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances as they shall judge to be for the good and welfare of the commonwealth, and for the subjects of the same. The exercise of this power, at least, has been left with the individual states, and cannot be taken from them, and exercised wholly or in part under legislation of congress. *Cooley*, Const. Lim. 715; *U. S. v. Dewitt*, 9 Wall. (U. S.) 41. Quarantine and health laws of every description, proper regulations for the use of highways, and the general right to control and regulate the public use of navigable waters are unquestionably with the state under the police power. Indeed, the police power of a state, in a comprehensive sense, embraces its whole system of internal regulations by which the state seeks, not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of citizen with citizen those rules of good manners which are calculated to prevent a conflict of rights. Judge Cooley says, in the American constitutional system the power to establish the ordinary regulations of police has been left with the states individually, and it cannot be taken from them, either wholly

or in part, and exercised under legislation of congress; so decided, as we have seen, in *U. S. v. Dewitt*, 9 Wall. (U. S.) 41. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the states. The state may also, under this power, says the same learned author, regulate the grade of railways, and prescribe how and upon what grade railway tracks may cross each other; and it may apportion the cost of making the necessary crossings between the corporations owning the roads; and it may establish regulations requiring existing railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade, or other places when their approach might be dangerous to travel, or to station flagmen at such or any other dangerous places. The legislature has power by general laws, from time to time, as the public exigencies may require, to regulate corporations in their franchises so as to provide for the public safety. This is held to be a mere police regulation. *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548. But certain powers directly affecting commerce may sometimes be exercised, when the purpose is not to interfere with congressional legislation, but merely to regulate the time and manner of transacting business with a view to facilitate trade, secure order, and prevent confusion. *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 361, where WOODWORTH, J., states very clearly the principles on which police regulations are sustained in such cases.

We have said that the laws to prevent the desecration of the Sabbath came properly under the police power of the state. Judge Cooley says, on this subject, the statute for the punishment of public profanity requires no further justification than the natural impulses of every man who believes in a supreme being, and recognizes his right to the reverence of his creatures. The laws against the desecration of the Christian Sabbath by labor or sports are not so readily defensible by arguments, the force of which will be admitted by all. The laws which prohibit ordinary employments are to be defended either on the same ground which justifies the punishment of profanity, or as establishing sanitary regulations, based upon the demonstration of experience that one day's rest in seven is needful to recuperate the exhausted energies of body and mind. Judge Cooley, speaking of those laws enacted to prevent desecration of the Sabbath, says they are not unconstitutional as a restraint upon trade and commerce. There can no longer be any question, if any there ever was, that such laws may be supported as regulations of police.

Validity of
laws on ob-
servance of
Sabbath.

Specht v. Com., 8 Pa. St. 312; *Bloom v. Richards*, 2 Ohio St. 387; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Bird*, 19 Cal. 130. Upon this subject of the Sabbath day observance, I have found none but state decisions in a great multitude of cited cases. It does not appear to have been ever, so far as my investigation has gone,—which has been somewhat limited, and not thorough,—a matter of decision with the federal courts, so far as the states are concerned. And I believe there is no probability that congress will ever assume the right to regulate the observance of the Sabbath day in the states. If, however, it should ever do so, I do not doubt that the American congress will protect the American Sabbath day from unnecessary desecration, by whomsoever it is essayed. Nor do I doubt that, if the supreme court of the United States should have this question under consideration, it would hold, as my view is, that the Sunday laws of this commonwealth are within the police powers of the state, and, moreover, that they in no wise affect interstate commerce, but, being limited in their operations to the state, whatever effect they have upon the through line of transportation outside of the state, it is no more than is proper, and in no way an interference with the granted power of the congress. It is to be regretted, as it is a federal question, that it cannot go up to the supreme court of the United States, and be settled there. Holding the views I do, I am constrained to dissent from the opinion of the majority.

State Police Regulations Concerning Railroads as a Regulation of Interstate Commerce.—See *Stanley v. Wabash, St. L. & P. R. Co.* (Mo.), 42 Am. & Eng. R. Cas. 328; *State v. Creedon*, (Iowa) 40 *Id.* 31; *Louisville, N. O. & T. R. Co. v. Mississippi* (U. S.), 41 *Id.* 36; *Louisville, etc. R. Co. v. State* (Miss.), 39 *Id.* 399; *Gulf, C. & S. F. R. Co. v. Dyer*, (Tex.), 42 *Id.* 503; *McCall v. People*, (U. S.), 45 *Id.* 1; *Norfolk & W. R. Co. v. Commonwealth* (U. S.), 45 *Id.* 9; *Crutcher v. Commonwealth* (U. S.), 46 *Id.* 637; *Little Rock, etc. R. Co. v. Hanniford* (Ark.), 30 *Id.* 67; *Smith v. Alabama*, (U. S.), 33 *Id.* 425; *McDonald v. Alabama* (U. S.), 33 *Id.* 420; *Chicago, etc. R. Co. v. Pierson* (Ill.), 12 *Id.* 156. Note, 16 *Id.* 45.

State Sunday Laws as a Regulation of Interstate Commerce.—See *State v. Baltimore & O. R. Co.* (W. Va.), 18 Am. & Eng. R. Cas. 466, note 481, which must be considered to be directly in conflict with the decision of the supreme court of Virginia, in the principal case.

Indictment of Railroad Company for Running Trains on Sunday.—See *State v. Norfolk & W. R. Co.* (W. Va.), 43 Am. & Eng. R. Cas. 330.

DEV *et al.*, Railroad Commissioners,

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(*U. S. Circuit Court, N. D. Iowa E. D., Feby. 12, 1891, 45 Fed. Rep. 82.*)

Action by Railroad Commissioners—Removal of Cause.—A suit by the railroad commissioners of a state to enforce obedience to their regulations by a railroad company cannot be removed to the United States court, although the parties are citizens of different states, and the answer raises a federal question.

IN EQUITY. On motion to remand.

Bill to enforce orders of the railroad commissioners of Iowa.

John Y. Stone, Atty. Gen., and *Fouke & Lyon*, for complainants.

John W. Carey, for defendant.

SHIRAS, J.—The statutes of the state of Iowa provide, for the election of three persons to constitute "the board of railroad commissioners of the state of Iowa," and among other powers and duties conferred upon them it is provided that "said commissioners shall have the general supervision of all railroads in the state operated by steam, and shall inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein," etc. It is further enacted that any person, firm, or corporation complaining of anything done or omitted to be done by any common carrier, subject to the provisions of the statute, may apply to the commissioners by petition, setting forth the wrongs complained of; and it is made the duty of the board to investigate such complaint, and to make a report in writing thereon of the facts in the premises, and the order made thereon by the board, a copy of which is required to be served upon the common carrier, and if the carrier refuses or neglects to obey the order or requirement of the board, then it is made the duty of the commissioners to apply, by petition, to the district or superior court in the county wherein the principal office of the common carrier is kept, or of any county in which the road is operated, for the entry of a decree against the carrier for the enforcement of the order of the board. Provision is made for giving notice to the company of such application, for the taking testimony

and hearing in a summary way, and for the issuance of writs of injunction or other process for compelling obedience to the order of the board, in case the same is affirmed, and for the imposition of fines, in case of disobedience to the injunction issued, which fines, upon order of the court, are to be paid into the county treasury, and one-half thereof is then to be paid by the county treasurer to the state treasurer.

Acting under the provisions of this statute, one E. J. Little, of Lima, Ohio, representing the Niagara Fuel Company of that place, filed a complaint before the board of commissioners of Iowa, alleging that the defendant company had wrongfully refused to transport certain tanks of oil from the station of the Chicago, St. Paul & Kansas City Railway Company in Dubuque to Eagle Point, where was situated the place of business of the consignees of the oil, the same being within the corporate limits of the city of Dubuque, Iowa, and upon the line of the defendant company, the said tanks of oil having been forwarded from Lima, Ohio. Notice of the filing of this complaint before the commissioners was given to the railway company, and an answer filed by it, setting forth, among other things, that the transportation of the oil in question was a matter of interstate commerce, and not subject to the order or control of the board of commissioners of the state of Iowa. One of the matters in controversy was whether the transportation of the tank cars from the depot of the Chicago, St. Paul & Kansas City road in Dubuque to Eagle Point, likewise in Dubuque, was a switching service, to be paid for at the rate established by the commissioners for such service, or was part of the original transportation from Lima, Ohio, in such sense that the defendant company stood in the relation of a connecting company with the Chicago, St. Paul & Kansas City road. Upon the hearing the commissioners held that the contract of the Chicago, St. Paul & Kansas City company was to forward the tank cars to Dubuque; that this contract was fulfilled when the cars reached the depot of that company in Dubuque; that the transportation of the cars from that depot to the place of business of the consignees at Eagle Point, a distance of about three miles, was merely a switching service, and for the performance thereof the Chicago, Milwaukee & St. Paul Railway Company was entitled to charge the rates fixed for such service by the commissioners, and no more. The company refusing to obey the order made, the board of commissioners filed a petition in the district court of Dubuque county, for the purpose of procuring a decree requiring and compelling the company to obey the order named. To this petition the company filed its answer, setting up, among other things,

that the transportation of the cars in question was a matter of interstate commerce, and therefore not within the jurisdiction of the board of railroad commissioners of the state of Iowa, and thereupon filed its petition to remove the cause into the federal court, setting forth therein that the controversy is wholly between citizens of different states, the defendant being a corporation created under the laws of the state of Wisconsin and the complainants being all citizens of Iowa; that the matter involved exceeds in amount, exclusive of costs and interest, the sum of \$2,000, and that the case presents questions arising under the constitution and laws of the United States, necessary to be heard and determined in the disposition of the cause. The transcript having been filed in this court, thereupon the complainants filed a motion to remand, on several grounds. Upon the argument of this motion the court suggested that it would hear counsel upon the question whether, admitting that the record showed that a federal question was involved, cases of this nature come within the jurisdiction of this court, so as to authorize a removal thereof for the purposes of an original trial; and, the briefs of counsel having been submitted, this question is now to be determined.

Upon part of the defendant it is submitted that the controversy is civil as distinguished from a criminal proceeding; that it is between citizens of different states; that it involves over \$2,000 in amount; and that therefore it is brought clearly within the provisions of the removal statute. If by reason of these facts the case is a removable one, then it could have been brought originally in this court, because the statute, in express terms, confers the right of removal, on the ground of diverse citizenship, only in cases which, under the first section of the act, might have been originally brought in a circuit court of the United States. The real question to be solved is therefore whether a circuit court of the United States can entertain jurisdiction of a proceeding brought under the provisions of the state statute to enforce by decree the orders made by the board of railroad commissioners, touching the management and operation of the railways within the state of Iowa.

Question presented.

In determining whether jurisdiction in the federal court exists, regard must be had, not only to the form of the particular proceeding, but also to the nature, source, and purpose of the right sought to be enforced, and if it appears that the controversy, in substance, involves a matter not within the federal jurisdiction, then the court must refuse to entertain it, even though in mere form the suit may be between citizens of different

Nature of proceeding must be considered.

states, and for an amount exceeding the jurisdictional limit named in the statute. Thus, in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265-292, it is said by the supreme court that "the essential nature and real foundation of a cause of action are not changed by recovering a judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." In that case an action was brought originally in the supreme court of the United States by the state of Wisconsin against the Pelican Insurance Company of Louisiana, upon a judgment rendered in the circuit court of Dane county, Wis., against the insurance company, for the sum of \$8,500 and costs. The form of the action was civil, being in debt upon the judgment record, but the supreme court, looking beyond the mere form of the action, found that the judgment sued on was for fines assessed against the insurance company for violations of the statutes of Wisconsin regulating the business of insurance within the state, and refused to entertain jurisdiction. While the ultimate judgment of the court in that case is placed upon the ground that "the courts of no country execute the penal laws of another," yet is it not entirely clear, from the line of reasoning pursued, that if the state of Wisconsin had filed a bill in equity in the supreme court of the United States against the insurance company, for the purpose of compelling obedience to some requirement of the state statute regulating the business of insurance within the state, the court would have held adversely to the jurisdiction, on the ground that courts of the United States are not clothed with jurisdiction to undertake the ordinary administration of the laws of the several states regulating matters of purely state concern? In the enactment of the statutes regulating the railway business of the state it is the sovereign power of the state that is the foundation of the authority to enact the statute. The establishment and maintenance of the public highways of the country is a governmental duty, and railways are only the modern or improved highway furnished for the transportation of passengers and property over the same. Although the construction and operation of the railways within the state has been intrusted to corporations, yet that fact does not deprive the state of the power to supervise the operation of the railways, nor re-

Enforcement
of state laws
belongs to
state.

lieve it of the duty of so controlling the management thereof as to secure to the public the use of such highways in such a manner as to fulfill the purpose for which the state authorized their construction. In the building, maintenance, and operation of the railway system of the state there was and is, of necessity, exercised powers of a sovereign or governmental nature. Such are the right of eminent domain and of taxation; and while the formal proceedings for the exercise of these powers may have been had in the name of a particular corporation, nevertheless the power set in motion thereby was that of the sovereign state, and its nature was not changed by the mere form of the means employed to call it into action. The taking of private property in the location and construction of a railway, in the first instance, can only be sustained under the power of eminent domain, and the right to continue the operation of a railway over the property of the citizen calls for the continued exercise of the same sovereign power, which can only be justified upon the principle that the operation, as well as the original construction of a line of railway, is the exercise of the public duty primarily imposed upon the state as the representative of the people, and in the performance of which the state may subject private property to the burden necessary to be imposed in order to secure the building and operation of the highway. In enacting statutes providing for the building, maintenance, operation and management of railways as part of the public highways of the state, the power exercised is sovereign or governmental, and the enforcement of the provisions of the statutes in these particulars belongs to the sovereignty enacting the statutes, and the agencies by it provided for that purpose, and no other government, state or national, can, either through its executive or judicial arm, undertake to administer such statutes.

In undertaking the public duty of regulating the operation of the railways of the state of Iowa, the legislature has provided a system creating a board of commissioners and authorizing such board to invoke the aid of the courts of the state in administering the law regulating the railways, and in express terms the statute creates the mode of procedure to be followed when the aid of the courts is invoked, and power is conferred upon the courts named in the statutes to grant writs of injunction and other process as a means of compelling obedience to the rules established by the board of commissioners, if the same are confirmed by the court. By the laws of the states of Wisconsin, Illinois, and other states, similar boards of commissioners are created therein. No one would contend for a moment, if the attorney general of Iowa should

apply, for instance, to the board of commissioners of the state of Wisconsin, for an order directed to the Chicago, Milwaukee & St. Paul Railway Company, requiring it to obey some provision of the statute of Iowa regulating the railway business in the latter state, that the Wisconsin board could entertain the same on the ground that the Chicago, Milwaukee & St. Paul Railway Company was a corporation created under the laws of Wisconsin. The reply would be that the board of commissioners of the state of Wisconsin had no power to administer the laws of the state of Iowa; and would not the same be true if the application was made to a court of the state of Wisconsin for a decree to enforce an order made by the Iowa commissioners? It is a well known fact that a large part of the railways of the state of Iowa are operated by corporations created under the laws of the states of Wisconsin and Illinois, and it certainly cannot be true that by reason of that or any other fact the attorney general of Iowa can file in the courts of those states petitions for decrees compelling obedience to the rules and orders adopted by the Iowa commissioners. The Wisconsin corporations would be within the territorial jurisdiction of the courts of that state, as would likewise be true in Illinois, as to the corporations created in that state; but the subject-matter of the controversy would not be within the jurisdiction of the courts of either of the named states, and for that reason no relief could be had therein. The same must be true of the federal courts,

**Federal court
has no
jurisdiction.**

for the United States has no more power to undertake the administration of the local laws regulating the railways of Iowa than has the state of Wisconsin. We must not be misled by the fact that this court exercises its jurisdiction within the state of Iowa. It is not a question of territorial jurisdiction in the limited sense of the mere place of bringing suit, but of jurisdiction over the subject-matter. If the contention of counsel for defendant is sustainable, and it be held that the subject matter of the controversy is within federal jurisdiction, then as to the mere place of bringing suit the choice is given, under the statute of 1888, of bringing the proceeding in the district wherein either the plaintiff or the defendant resides, and this suit might have been brought in the federal court in Wisconsin. The argument that sustains the jurisdiction in the federal courts over the subject matter must likewise sustain the jurisdiction of the federal court in Wisconsin, as well as that in Iowa. Can it be true that the United States courts in Wisconsin will undertake the duty of compelling the Wisconsin corporations to obey the rules and regulations of the state of Iowa touching the railway business in Iowa? If, however, the United

States courts in Iowa can take jurisdiction of a proceeding of this nature on the ground of diverse citizenship, simply because the commissioners are citizens of Iowa and the defendant a corporation created under the laws of Wisconsin, then it must follow that the proceeding might have been originally brought in the United States circuit court in Wisconsin, and if there is nothing in the subject matter of the proceeding precluding the United States court in Wisconsin from undertaking jurisdiction, there is nothing to preclude the state courts of Wisconsin from doing likewise, and thus the conclusion will be reached that the state of Iowa, acting through its board of commissioners, can impose upon its sister states, as well as upon the United States, the duty and expense of administering the public laws of the state of Iowa, regulating its highways, and the operation and management thereof.

A strong argument against the exercise of jurisdiction by the federal court of a proceeding of this nature can be based upon the provisions of the statute regulating the method of procedure. The statute provides that a petition shall be filed in the district or superior court of the proper county; that it shall be a proceeding in equity; that it shall be heard in a summary and inexpensive way; that the court shall have power to issue injunctions mandatory and restrictive, requiring obedience on part of the railway company, its officers, and employes, to the decree of the court, and to punish a violation thereof by a fine not exceeding \$1,000, and by imprisonment; that the decree entered by the court shall remain in force until the rule or order on which it is based shall be modified or vacated by the commissioners. If the federal court can, either originally or by removal, take jurisdiction of a petition filed by the board of commissioners under this statute, how is the same to be proceeded with? The statute, as well as the nature of the remedy, requires the proceeding to be in equity. Can a federal court carry through a suit in equity in any other mode than is provided for in the rules of equity prescribed by the supreme court? If the court requires the suit to be conducted as therein provided, then the orders of the board are not carried into effect in the summary and inexpensive way provided for in the state statute. Furthermore, the statute itself points out the methods, by fine and imprisonment, by which obedience to the decree of the court, enforcing the order of the commissioners, is to be secured. Can the courts of the United States enforce such punishment? If the United States court orders the imprisonment of A. B. as a means of enforcing obedience to its decree, can the board of commissioners, by vacating the order made by them, vacate

Same—Effect
of statute pro-
viding
method of
procedure.

the decree of the United States court and thus release A. B. from imprisonment? If fines are imposed by the United States court, and collected or paid into the hands of the clerk, what disposition is to be made thereof? Can the clerk, disregarding the provisions of the United States statutes, pay such fines to the treasurer of the county under the provisions of the state statute? These and other like difficulties tend to support the conclusion that a proceeding of this nature, whether viewed in regard to the nature of the power sought to be exercised, or in regard to the form of the proceeding, and the results to be accomplished thereby, is one not within the jurisdiction of the federal courts under any statute now in force. The distinction existing between controversies wherein it is sought to enforce or protect private rights and those wherein the state, either in its own name or through the agency of officials, created by the laws of the state, is seeking to enforce public rights or fulfill public duties, must be kept in mind. A failure on the part of a common carrier to obey or observe some provision of the state statute may create a right of action, private in its nature, on behalf of an individual of which the federal courts would have jurisdiction if the amount at stake, and the citizenship of the parties litigant, was such as to confer jurisdiction between the parties, but when the proceeding is brought under the state statute for the purpose of compelling the common carrier to manage its business in the mode required by the rules or orders adopted by the commissioners, then the state is seeking to compel obedience to its public laws, and the state, whether the suit is in its own name, or in that of some board or official created by the laws of the state, is acting in its sovereign or governmental capacity, and in so doing it must act through agencies of its own creation.

In the present case the state of Iowa, through its board of commissioners has undertaken to regulate the method of switching cars between the different lines of railway terminating at the city of Dubuque, and has fixed the compensation to be paid therefor, and by the proceeding filed in the district court of Dubuque county seeks a decree of court to compel the defendant company to obey the rule thus established. The purpose of the proceeding is not to establish or protect any private right, or to recover damages for a wrong done to an individual, but solely to compel the railway company to yield obedience to the laws of the state regulating the railway business of the state; and of such a proceeding the courts of the United States are not authorized by the statutes now in force to take jurisdiction, either originally or by re-

Federal court
cannot en-
force state
regulation of
railways.

moval. It is further urged, in support of the jurisdiction, that upon the face of the record it is made to appear that there is a federal question involved in the controversy, and on this ground the jurisdiction can be sustained. If it be admitted that the facts pleaded in the answer of the defendant company do present a question arising under the constitution and laws of the United States, that does not change or affect the inherent nature of the proceeding. If the subject matter of the petition filed is without the jurisdiction of the circuit court, for the reasons already assigned, pleading a defense thereto, based upon the constitution of the United States, cannot confer the power to grant the relief sought by the petition in case the defense is overruled. The remedy in such cases is to set up in the state court the defense presenting the federal question, and if the ruling therein is adverse to the right asserted under the federal constitution, then this question can be taken from the court of last resort in the state to the supreme court of the United States. In this way the administration of the public laws of the state is left to the state tribunals, although the federal question is decided by the highest federal court.

Federal
questions
involved.

The conclusion reached is that the subject matter of the proceeding originally brought in the district court of Du-buque county is not within federal cognizance: that the pleading a defense, based upon the federal constitution and laws, does not change the character of the controversy, and therefore the proceeding is not one of which the circuit court of the United States can take jurisdiction, by removal or otherwise. The motion to remand must therefore be sustained.

CALDWELL, J., concurs.

Jurisdiction of Federal Court over Removed Case which could not Originally have been Brought in that Court.—See *People v. Colorado Central R. Co.* (C. C.), 45 Am. & Eng. R. Cas. 599.

Removal of Proceeding in State Court to Condemn Right of Way.—In *Kansas City & T. R. Co. v. Interstate Lumber Co.*, 37 Fed. Rep. 3, it was held that a proceeding in state court for condemnation of right of way, is a suit at law, and may be removed into federal court in pursuance of acts for the removal of causes. And under the Missouri statutes for the condemnation of land by railroad companies, providing that a summons shall be issued to the owner giving him ten days' notice of the time when the petition will be heard, where the cause is removed to the United States circuit court on the return day of the summons, the appointment of commissioners by the latter court to assess damages is a proceeding in the cause, and will not be made prior to the next regular term after the removal. The court say: "The statute directs in substance that where lands are sought to be appropriated by any railroad for public use, and the parties cannot agree upon the proper compensation, such corporation may apply to the circuit court of the county where the land lies, or the judge thereof in va-

cation, by petition setting forth certain specified facts, praying the appointment of three commissioners or a jury to assess the damages. Upon filing the petition, a summons shall be issued, giving such owner at least 10 days' notice of the time when the petition will be heard. Provision is also made for notice by publication to unknown and non-resident parties. The court, or judge in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three commissioners, freeholders and residents of the county where the land is situated, to assess the damages, who, after viewing the property, shall forthwith return under oath such assessment of damages to the clerk of the court. The clerk shall file such report, and record the same, and thereupon such company shall pay the clerk the amount of the assessment for the party in whose favor it is made; and, on making such payment, it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid, etc. It is then provided that upon the filing of such report the clerk of the court shall duly notify the party whose property is affected of the filing thereof; and the report of said commissioners may be reviewed by the court in which the proceedings are had, on written exceptions filed by either party in the clerk's office within 10 days after the service of the notice aforesaid; and the court shall make such order therein as right and justice may require, and may order a new appraisal upon good cause shown. Such new appraisal, at the request of either party, shall be by a jury, under the supervision of the court, as in ordinary cases of inquiry of damages; such proceedings, however, not to affect the right of the company to enter upon the land, it having paid the original assessment, but only the amount of compensation to be allowed. What has been said respecting remanding the cause is quite applicable to this motion. Judge Dillon, in his work on Removal of Causes, (page 71,) says:

'The jurisdiction of the circuit court does not properly attach until the record of the state court is entered therein. If it be entered before the time, it has been made a question whether it will then attach. For some purposes it would seem that it might; as, for example, if it became necessary meanwhile to issue an injunction, or appoint a receiver, (which should be done, however, only upon notice,) in order to protect the right of the parties, or to preserve the property in litigation.'

"So BILLINGS, J., in *New Orleans R. Co. v. Crescent City R. Co.*, 5 Fed. Rep. 160, on refusing to dissolve an injunction before the return day of the record, very aptly expressed the limitation of the rule as to what the United States circuit court might do *ad interim*:

"'What the court should do in this, as in all cases where the record is here before the return day, is by all proper orders to preserve the property in dispute, and the rights of all the litigants.'

"But it must be conceded that to entertain this motion, and proceed now to the appointment of commissioners, is to proceed with the cause. It is to assume that the cause is properly here, and to take a step therein in the nature of adjudication. As shown by the preceding discussion herein, the court may be called upon to determine, in the first instance, whether or not it has acquired jurisdiction, either over the subject matter, or from the character of the parties. Unless it has so acquired jurisdiction, it could not proceed to appoint the commissioners, as its act therein would be *coram non judice*. In the next place, the court must determine, from an inspection of the petition, whether or not the jurisdictional facts are stated entitling the petitioner to institute the condemnation proceeding. If it be said in answer to this that the state court has already determined the sufficiency of the petition in issuing the summons to the defendant, it is not maintainable, because the statute directs that upon filing the petition summons shall be issued, giving the owner 10 days' notice 'of the

time when said petition will be heard; showing that the petition is not to be heard until after such summons. And as the cause was removed from the state court on the return day of the summons, the petition remains to be heard. The succeeding section of the statute provides that the next step to be taken is that the court, or judge in vacation, shall be satisfied that due notice of the pendency of the petition has been given. These are facts to be ascertained by the court in the progress of the cause; and whatever construction may be placed upon the term 'said petition will be heard,' whether it pertain, as contended by counsel for defendant, to the determination in advance of the question whether or not the use be a public one to which the property is to be applied, or whether it pertains solely, as contended by counsel for the petitioner, to the giving the property owner the right to be heard in the matter of appointing proper commissioners, it still remains an action taken by the court in the progress of the condemnation proceedings, and as such it cannot be regarded as in the nature of a mere provisional order designed to maintain the *statu quo* of the parties, 'or to preserve the property in litigation.' It was for this reason, in the main, that Judge NELSON, in *Re Barnesville & M. R. Co.*, 2 McCrary (U. S.), 216, 4 Fed. Rep. 10, refused, before the return day, to appoint such commissioners. As already suggested, before the appointment of such commissioners could be made on this record, I should have to determine the question as to whether this cause was properly removed to this court; and as I am inclined to the opinion that the same was prematurely removed, and as I have just held that I cannot remand it until the next session of this court, it must follow that I must decline to appoint commissioners as requested."

WHEELING BRIDGE & TERMINAL R. CO.

v.

CAMDEN CONSOLIDATED OIL CO.

(*West Virginia Supreme Court of Appeals, June 13, 1891.*)

Partial Construction of Railroad—Retention of Corporate Existence and Franchise.—A railroad company chartered under the general law of the state may complete and operate a part of its railroad, and, as to the part so completed and operated, retain its corporate existence, franchise, and powers. Chapter 54, § 66, Code, (Ed. 1877.)

Same—Construction of Branch Road.—A railroad company organized under such general law may build and construct lateral and branch roads not exceeding 50 miles in length, and use and operate any part or portion of their main line and branch or branches when completed, the same as though the whole of the proposed railroad were fully completed. Chapter 54, § 69, Code 1887.

Same—Branch Road from a Branch Road.—Such branches may have, in part, a common stem leading from the main line,—that is, there may be a branch from a branch—provided the limit as to length is not exceeded.

Location of Road—Filing of Map and Profile.—Under the provisions of the general law of this state, the filing of the map and profile of the location of the railroad in the office of the secretary of state, and in the office of the clerk of the county court of each county in which any part of the road is located, is not in law a condition precedent to the appointment of commissioners to ascertain a just compensation to the owners of the real estate proposed to be lawfully taken for the purpose of such road; but the

circuit court may, in its discretion, require such map and profile, or such part as may be needed, to be filed or produced before appointing such commissioners.

Power to Condemn—Condition Precedent—The Delivery of the Certificate of Incorporation of such company, or of a copy thereof properly certified, to the clerk of the county court for record in the county in which the principal office or place of business of such company is, is not a condition precedent to the proper and lawful exercise of the right to condemn.

ERROR to Circuit Court, Ohio County.

J. F. Jacob and H. M. Russell, for plaintiff in error.

Ewing, Melvin & Riley and W. P. Hubbard, for defendant in error.

HOLT, J.—This is a writ of error to the judgment and rulings of the circuit court of Ohio county in a proceeding by way of petition on the part of the railway company to condemn certain real estate belonging to the Camden Consolidated Oil Company. The constitution of the state of West Virginia requires that "the legislature shall provide for the organization of all corporations hereafter to be created by general laws uniform as to the class to which they relate; but no corporation shall be created by special law." Const. W. Va. art. 11, § 1; Code W. Va. (Warth's Ed.) p. 40. In pursuance of this requirement, the legislature has from time to time enacted the law as we now find it in chapters 52-55, pp. 484-559, Code W. Va. Under this law the railway company became incorporated and received its charter on the 6th day of March, 1882, but by the name of the "Wheeling & Harrisburg Railway Company of West Virginia." On the 12th day of September, 1889, the name was changed to the present one, "Wheeling Bridge & Terminal Railway Company." The railroad which this corporation proposed to build commences at the west corporation line of the city of Wheeling, in Ohio county, on the line between the state of Ohio and the state of West Virginia, and is to run thence by the most practical route to a point in Marshall county, at or near where the line between the state of West Virginia and the state of Pennsylvania is crossed by Wheeling creek. The city of Wheeling, by ordinance of its council passed February 28, 1888, which took effect May 28, 1888, gave its consent that this railway company might construct, maintain, and operate a branch railroad for terminal and connecting tracks and facilities in the city of Wheeling, subject to certain restrictions and conditions which need not here be mentioned; and on the 18th day of January, 1889, the city passed another ordinance on the subject. This railroad company has already built along its main line a double track railroad bridge across the Ohio river, two double track tunnels,

—one 557 feet long; the other 1,203 long,—to a point called the "Peninsula," in the valley of Wheeling creek, and a branch from that point down Wheeling creek, on the south side, thence through Chapline hill, by a double track tunnel, 2,460 feet long, to the lower end of the city of Wheeling, on the Ohio river. The railway company has found it necessary for its legitimate purpose to have a freight station near the northern portal of its Chapline-Hill tunnel; but there is no room on the south side of Wheeling creek. Therefore it is compelled to build a switch or branch across Wheeling creek to the north side for that purpose; and this proceeding has been instituted for the condemnation of the land in question, lying on the north side, belonging to the oil company. The oil company appeared in the court below, and resisted such condemnation, putting its objections in the form of seven common law pleas, which it tendered and offered to file, to each of which the plaintiff objected. The court rejected pleas numbered 1, 2, 4, and 5, but permitted numbers 3, 6, and 7 to be filed, on which issues were made up, and tried by a jury. During the trial the court gave at the instance of plaintiff, and against the objection of defendant, seven several instructions. The defendant then moved that the jury be directed to find in writing upon three several questions of fact written out for the purpose, (see § 5, chap. 131, Code, p. 813;) but the court refused, and the case being submitted to the jury, they returned for plaintiff a general verdict on the issues joined, also a special finding for plaintiff on each of the issues joined on the three pleas filed. Thereupon the defendant moved the court to set aside the verdict, and grant it a new trial; but the court overruled the motion and proceeded to appoint five commissioners, in accordance with § 10, chap. 42, p. 312, of the Code to ascertain what would be a just compensation to defendant for each parcel of real estate proposed to be taken. To all these rulings against defendant it excepted, the evidence being certified, and the cause is now here for review.

The serious question intended to be presented by this record grows out of the rejection of pleas Nos. 1 and 2. Section 65, chap. 54, p. 525, Code, (Warth's 2d Ed.) reads: Every such corporation shall, within a reasonable time after its railroad is located, cause to be made a map and profile thereof with the names of the owners of the lands through which it runs, and of the noted places along the same stated thereon, and file the same in the office of the secretary of state, and in the office of the clerk of the county court of each county in which any part of said road is located." Plea No.

Location of
road—Neces-
sity for filing
map and pro-
file.

1 avers in substance, that plaintiff had failed to comply with this section as to its main line, although a portion of such road had been located for the space of one year before the beginning of this proceeding. Plea No. 2 makes the same averment as to the lateral or branch railroad mentioned in plaintiff's petition. Is the filing of such map and profile of location a condition precedent to the right to condemn land? It is not in express terms made a condition precedent to the exercise of such right, and, if it be such, it must arise from an implication reasonably necessary. By chapter 54, § 34, p. 512, Code, when the certificate of incorporation shall have been issued and delivered as provided, "the corporators named in the articles of incorporation recited therein, and who have signed the same, and their successors and assigns, shall from the date of said certificate become and be a body corporate, as therein stated, and as such authorized to proceed to carry into effect the object set forth in said articles of incorporation, in accordance with the provisions of this chapter." Chapter 42 of the Code confers upon railroad companies, among others, the right to take private property for the construction of their roads, and prescribes the prerequisites and the method of procedure, and among them is the requirement that the application be in writing, "describing with reasonable certainty the real estate proposed to be taken;" so that to give a particular and certain description to the owner of the land proposed to be taken cannot be the sole purpose of requiring the map and profile to be filed, but rather that its location as a whole may be accessible to the public, and the description of the extent and limits of the real estate owned by the railway company may be preserved. And the court below has the right to require that the description of the land proposed to be taken be made certain and definite, and, if deemed necessary to that end, to require a map and profile of the location, as far as it has been made, to be filed or produced; for the law contemplates that construction of the road may be commenced, and therefore, if necessary, condemnation of the land be had, before a final location of the whole road, as intended and set out, has been made; for section 69 of chapter 54 provides that "any railroad company organized under this chapter may build and construct lateral and branch roads or tramways, and of any gauge whatever, not exceeding fifty miles in length; and it may build planes and gravity roads, use and operate any part or portion of their main line and branch or branches, when completed, the same as though the whole of their said proposed railway was fully completed." So, again, our statute contemplates, in fact requires, in this particular, as a necessary prerequisite

to the right of condemnation, that the railroad corporation shall acquire such real estate by purchase, if it can agree with the owners. Section 48, chap. 54, p. 518, Code. And in this instance the railway company appears to have acquired its real estate for the most part in that way, and to have already occupied such part with the bridges, tunnels, and roadways of a railway well nigh to that extent completed. Our lack and need of railroads is thought to be great; hence our general law upon the subject is broad and liberal, perhaps beyond precedent. The railway company has been unable to agree with the defendant for the purchase of its part of the real estate needed. Can it be that under such a statute it can interpose as a plea in bar to the awarding of a commission of condemnation the fact that the map and profile of location has not been filed as required by law. How are we to say that one year is a reasonable time in this particular case? The evidence shows that the difficulties and perplexities of location, as well as of construction, have been great to an extraordinary degree,—so much so that it had to feel its way, as it were, with great caution and circumspection,—and it might have been highly inconvenient and embarrassing to commit itself at once to a definite location throughout. The main line, with its bridges and tunnels and the rest of its track, is about complete from the Ohio state line into the valley of Wheeling creek; and it seems to be the purpose of the company to stop there in the construction of the main line until the more pressing need of branches and terminals in the city is supplied. The branch that runs down Wheeling creek, on the south side, by the land in question, and thence through the Chapline-Hill tunnel to Lower Wheeling, is well nigh complete; certainly, far enough to show its location. There is no complaint that the petition does not designate with sufficient certainty the real estate proposed to be taken. If there had been for the purpose of this proceeding any need of such map and profile, the court below could, and would have required its production; but we do not think that the failure to file it in the proper offices could be pleaded in bar of the right to have the commission awarded; and therefore we think that pleas Nos. 1 and 2 were properly rejected. Besides, it appears that this land is needed only for a station and a switch to connect it with the branch on the south side of the creek. Plea No. 4 avers that the land sought to be condemned was so situated that it could not be used until the street had first been occupied, and that no permission to occupy the street had been obtained. This plea was properly rejected. The city of Wheeling may give its consent, but, if this property can-

Permission to
occupy street
of city.

not be obtained, it is not worth while to ask such consent. If the property is obtained, and no consent by the city be given, the property owner is not hurt, because the land condemned would then revert to the original owner. Chapter 54, § 69a, par. 9. The company cannot do everything at once; and if each condemnation or permission on the part of the city is made a condition precedent to every other one, then no property could be condemned at all. Besides that is a matter between the city and the railway company, and does not directly enter into this controversy.

Plea No. 5 avers that the railway company did not, within three months after its certificate of incorporation had been

**Failure to file
certificate of
incorporation
—Condition
precedent.**

issued, cause the same, or a certified copy thereof, to be delivered for record to the clerk of the county court of Ohio county, in which its principal office and place of business is kept as required by section 20, chap. 54, Code, p. 508. This plea also was properly rejected, such recordation, for the reasons given in considering pleas Nos. 1 and 2, not being a condition precedent to the right to construct, and for the additional reason that the same section provides that, "if such company fail therein, it shall be fined not exceeding \$1,000." Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 32 Am. & Eng. Corp. Cas. 212. Plea No 6 "denies that the railroad, for the purposes for which the land is sought to be condemned, is a branch or lateral road, as stated in the petition." This plea is obscure and uncertain in meaning;

**Right to con-
struct branch
road.**

but, taking it to aver with sufficient certainty what defendant claims it is intended to aver,—that it is a branch of a branch, and therefore not a branch of a main line, it should have been rejected as immaterial; for nothing is clearer under our statute than that the railway company may legally construct a branch of a branch, or that two branches may have a common stem leading into the main line, provided neither exceeds 50 miles in length from such main line. Plea No. 7 alleges, in brief, that the plaintiff has abandoned the line which it was chartered to build, and has begun to build an entirely different line, for which it

**Same—Aban-
donment of
main line.**

sought to condemn the property in controversy, without authority of law. Plea No. 3 avers that the said parcels of land in said petition mentioned, and sought to be condemned are not, nor is either of them, necessary for the purposes of the petitioner's railroad. These pleas, Nos. 3, 6, and 7 were admitted, issues were made and joined thereon, and the jury found generally for the plaintiff, and specifically on each of these three pleas. It was proved that the road along the main line from the west bank

of the Ohio river to a point in the Wheeling Creek valley, called the "Peninsula," had been built, and there the company proposed to stop until, by the building of a branch line down Wheeling creek, it had made terminal facilities for the city of Wheeling; therefore it was not material to this inquiry where or how the main line was to run on from that point east, and it was not error to exclude such evidence. Again, the chief engineer of the railway company was asked by plaintiff why the work had been mainly done upon the line from the western boundary of the state to the peninsula, and from the peninsula, with the creek, southward. To this question defendant objected, but its objection was overruled. The answer was material under plea No. 7, as tending to show that the further extension of the main line was not abandoned, but only, for the reasons given, deferred until the terminal facilities in the city of Wheeling were shown to be practicable by actual construction, and the road just put upon a solid and paying basis. It also tended to show that the one was a part of the main line, and the other going down the creek was a branch.

It is admitted by counsel that all the instructions given to the jury do not appear in the record; therefore the court cannot say to what extent, if any, the instructions given and set out in the record were qualified by those given, but not set out. Seven instructions were on motion of plaintiff, and against the objection of the defendant, given to the jury, which are a part of this record, and are as follows: (1) If the jury believe from the evidence that the petitioner built and constructed its main line of railroad as designated and contemplated by its charter from the western boundary of the city of Wheeling to a point on the peninsula, it had and has the right to construct a branch or lateral line of railroad connecting with the main line at such point; and this, although the jury may further believe from the evidence that it ceased further work on the main line, and abandoned all intention of building and constructing further in an easterly direction, or towards the Pennsylvania state line. (2) If the jury find from the evidence that the line of railroad constructed from the Ohio river near the Top mill to the peninsula is a portion of the main line of petitioner's railroad, as contemplated by its charter, they are instructed that the length of the line connecting with such main line at the peninsula, and running thence southwardly, is not decisive of the question whether such second line is or is not a branch or lateral road. Neither length nor direction enters into the definition of a 'branch or lateral' railroad. The only limit in this state as to length is the statutory one of 50 miles. (3)

Instructions
to jury.

If the jury find from the evidence that any substantial portion of the main line of the railroad contemplated by the charter of the Wheeling & Harrisburg Railroad Company has been built or constructed by the petitioner, their verdict should be in its favor upon the issue raised by the 7th plea. (4) If the jury find from the evidence that so much of the petitioner's railroad as has been constructed from the Ohio river near the Top mill to a point on the peninsula is a portion of the main line of such railroad, as designated and contemplated by the charter of the Wheeling & Harrisburg Railroad Company, then their verdict should be for the petitioner, the Wheeling Bridge and Terminal Railway Company, on the issue presented by the 7th plea filed by the defendant. (5) Even if the jury should believe from the evidence that so much of the petitioner's railroad as crosses Wheeling creek near the Whitaker mill is a branch railroad of a branch railroad, this will not warrant a finding to that effect, or for the defendant, on the issue raised by the 6th plea of the defendant. (6) While it is incumbent on the petitioner to show by a preponderance of the evidence that a necessity exists for the taking of the property described in the petition, such necessity is not to be regarded and treated as an imperative, but a reasonable, one, looking to the proper discharge by the petitioner of its duties to the public; and if the jury believe from the evidence that such a necessity exists, taking into consideration the present, and also the prospective, needs of the petitioner, within a reasonable time, and that it has not in this instance unreasonably exercised the discretion it possesses in locating its tracks, buildings, etc., then the verdict should be in its favor upon the issue presented by the 3d plea filed herein. (7) Railroad companies possess a large discretion as to the location of their tracks and buildings; and this discretion is not to be controlled if it has not been exercised unreasonably. And in this case, even if the jury should believe that lands other than those in question might or could have been found and acquired suitable for the petitioner's purposes, that fact would constitute no defense or objection to the present claim." In view of our statute on the subject, especially sections 66 and 69 of chap. 54, pp. 526, 527, instruction No. 1 propounds the law correctly as applicable to this proceeding; because under chap. 54, section 50, par. 9, p. 520, Code, plaintiff "has the right to erect and maintain all necessary and convenient buildings and stations, fixtures, and machinery, for such connections, constructions, transfer accommodation, and use of passengers, freights, and business interest, or which may be necessary for the construction or operation and repair of said railroad, its track, roadway, and machinery, for the purposes of that part of the main line and branch already built," and

to condemn such land as may be necessary for such purposes, within the limits as to quantity and distance as are prescribed by statute. The effect of the abandonment of construction of the residue of the main line in other respects need not be here discussed; it cannot avail to defeat this proceeding. Instruction No. 2 states the law correctly as given by our statute, and has been already discussed. Instruction No. 3 has already been discussed, and is substantially correct. Instruction No. 4 is also correct for reasons already given. Instruction No. 5 was in effect the rejection of plea No. 6. Instructions Nos. 6 and 7 propound the law correctly.

Under section 5, chap. 131, p. 813, Code, the defendant moved the court to direct the jury to find in writing upon particular questions of fact, as follows: "(1) Is the line of road with which, at a point near Whitaker's mill, the road for which the property is sought connects, the main line of the petitioner? (2) Is the line of road with which, at a point near Whitaker's mill, the road for which the property sought connects, a branch or lateral road? (3) Is the line of road which crosses the defendant's property a branch or lateral road?" This the court refused to do, and properly, because, on motion of defendants, it had already directed the jury to find separate verdicts on the issues joined on the three pleas, in addition to a general verdict, and pleas Nos. 6 and 7 cover the same ground. *Wheeling Bridge Co. v. Wheeling & Belmont Bridge Co.*, 34 W. Va. 155, (decided by this court, 13th September, 1890.)

Request for
special find-
ings.

In conclusion, did the court err in overruling defendant's motion for a new trial? The evidence in this case shows without contradiction in any essential particular, and by a clear and decided preponderance in all matters of inference, that this railway company, acting under our general law, has, at an expense of millions, built in good faith some 3,000 feet of its road along its charter line from the west bank of the Ohio river to the peninsula, in the valley of Wheeling creek, made up for the most part of double track bridges and double track tunnels; that the financial success and public usefulness of the road, as a whole, depended almost entirely, as far as the facts proven now enable us to see, upon the feasibility of making by various branches what the experts call a "terminal system,"—"a railroad tunnel," one witness calls it—in and around the city of Wheeling, by which the raw material may be easily and abundantly brought in, and the manufactured products taken out; that the making of this terminal system was confronted with so great and so many physical difficulties, not to speak of difficulties of other kinds, that capitalists who were to fur-

Motion for a
new trial.

nish the money could only be convinced that the thing could be done by the doing of it; hence the expensive and difficult branch down Wheeling creek on the south side, and through Chapline hill by a long double track tunnel, and hence the necessity of the land in question, in connection with contiguous tracts, above and below, already acquired for station and side tracks, for heavy freight, and for the switch leading from the branch line by bridge across the creek thereto. The evidence makes the necessity for taking it for this purpose palpably plain. The defendant, apart from the question of filing map and profile and certificate of incorporation, resists the condemnation on two grounds: (1) It suggests a conjecture that the plaintiff may never complete any more of its charter line; that therefore its present branch line down the creek is not a branch in fact, but a part of the main line, perverted from its lawful course under the guise of a branch. (2) That this switch, driven across the track as a physical necessity to reach the station and track yard on the north side, is not a switch, but a branch in the guise of a switch, and that there cannot be a branch of a branch, and therefore the making of it is without warrant of law, as if two branches could not lead back to the trunk part way along a common stem. The court below overruled this motion for a new trial, and, in pursuance of the statute, directed and appointed a commission to view, appraise, and report. We think the merits on all material points are with the plaintiff, and therefore affirmed.

Authority of Railroad Company to Construct Branch Roads.—See *Blanton v. Richmond, etc., R. Co. (Va.)*, 43 Am. & Eng. R. Cas. 617, note 621.

Eminent Domain—Filing of Maps and Profiles in Condemnation Proceedings.—The primary purpose of a map and profile of a railroad in condemnation proceedings, is to give the landowner notice of the proposed route of the road, and to aid in the description of the premises proposed to be taken. It is essential that the petition should so describe the premises intended to be taken, that there can be no question as to their identity. Frequently, the filing of a map, plan, and survey, is made preliminary to the institution of proceedings, and, if so, must be strictly complied with. A "map and survey" of the route of a railroad company required by statute to be filed, must be something more than a general outline map giving an approximate idea of the situation of the road without the means of fixing each point and course. The map must embody or be accompanied by such full and accurate notes and data as will furnish complete means for identifying the precise position of every part of the line, with course and distances throughout, so that there can be no doubt as to where any portion of it is to be found. *Convers v. Grand Rapids & I. R. Co.*, 18 Mich. 459. In *In re New York & B. R. Co.*, 62 Barb. (N. Y.), 85, the prerequisites of a map and profile of the route of a proposed railroad, which was required by the laws of New York to be filed in the county clerk's or register's office, before constructing any part of such road are stated. The map and profile in this case was held defective.

In *Pennsylvania R. Co. v. Reichert*, 58 Md. 261, 10 Am. & Eng. R. Cas. 429, it was held that it was not necessary for a railroad company, in pro-

ceedings to condemn land, to give any other or more particular description than was furnished by a plat referred to in the declaration. The plat in this case showed with certainty the lines of the land condemned, and with equal certainty designated the location of the trestle required. And in *Ackerman v. Huff*, 71 Tex. 317, 36 Am. & Eng. R. Cas. 589, it was held that where the petition for condemnation proceedings particularly describes the land sought to be taken and a plat thereof is filed with it, in the absence of evidence to the contrary, the lands will be held to be described with sufficient certainty.

Where the petition to condemn describes the land over which the road is to run in general terms, and refers to a map filed with the petition for a more particular description, the description of the land sought to be taken is sufficient. And where such map is not attached to the files the supreme court will assume that it was all that was asserted in the petition in which it was filed, especially, since the lower court will be presumed to have examined the map and found it sufficient. *Cory v. Chicago, B. & K. C. R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183. And where land has already been taken for the track of a railroad, and the road has already been located and built and is being operated, a report of commissioners thereafter made, appraising the value of the land taken and assessing the damages for taking it, in which a diagram is inserted showing the shape of the land and the course of the road across it, stating upon which subdivision of a particular section the land taken is located, contains a certain and sufficient description of the land taken and used, though no actual survey by courses and distances be made. *Strang v. Beloit & M. R. Co.*, 16 Wis. 635.

The petitioning company may be required before trial to exhibit a plan and profile of its road, so as to show to what use it designs devoting the land, and what it proposes to put upon it. *Chicago & N. W. R. Co. v. Chicago & E. R. Co.*, 112 Ill. 589, 25 Am. & Eng. R. Cas. 158. But in Kansas, it is held that the map, profile, and notice required by statute, need not be given or filed prior to the commencement of the proceedings for condemnation. *Chicago, K. & W. R. Co. v. Abbott*, 44 Kan. 170; *Missouri River, etc., R. Co. v. Shepard*, 9 Kan. 647. And in the same state it has been held not necessary that a railroad company should file with the county clerk a map and profile of the entire line of their proposed road through a county before they can apply to have commissioners appointed to make an appraisal and assessment of damages to any part of the property along the line of said road. A map and profile of what the company desires to have appraised is sufficient. *Hunt v. Smith*, 9 Kan. 137. See also, *Somerville R. Co. v. Doughty*, 21 N. J. L. 442. In New York, it has been held that it is not necessary for a company purchasing the property and franchises of another railroad company at a foreclosure sale, to file a map of the land thus acquired, where it is already constructed. *People v. Brooklyn, F. & C. I. R. Co.*, 89 N. Y. 75, 9 Am. & Eng. R. Cas. 454. And in Massachusetts, a person whose land has been taken cannot, after the railroad has been completed and has been in use for nearly twenty years, object to such use, on the ground that no plan has been furnished him, as required by statute, of railroad companies before they proceed to construct a road. *Abbott v. New York & N. E. R. Co.*, 145 Mass. 450, 33 Am. & Eng. R. Cas. 146.

A railroad company's title to land is not affected, nor the running of the time for applying for damages sustained by the failure of the company to furnish the owner of land taken by it with a plan of the location. *Brock v. Old Colony R. Co.*, 146 Mass. 194, 33 Am. & Eng. R. Cas. 96.

The map filed by a railroad company of the route on which it proposes to build a railroad, is not the only evidence which may be offered in a con-

demnation proceeding to show the land condemned for right of way. Chicago, K. & W. R. Co. *v.* Grovier, 41 Kan. 635, 39 Am. & Eng. R. Cas. 146.

CITY OF SEYMOUR *et al.*

v.

JEFFERSONVILLE, MADISON & INDIANAPOLIS R. CO.

(126 Indiana, 466.)

Eminent Domain—Condemnation of Railroad Track for City Street.—In the absence of express statutory authority, a municipal corporation, authorized to appropriate lands for streets, has not the power to take land occupied and used by a railroad company for its track. Proceedings instituted by a municipal corporation to condemn such land may be enjoined.

APPEAL from Jackson Circuit Court.

O. H. Montgomery, for appellants.

S. Stansifer, for appellee.

ELLIOTT, J.—The appellees allege in their complaint that the Jeffersonville & Madison Railroad Company is the owner in fee of a strip of ground 60 feet in width: that title was acquired in fee under the provisions of the charter, and by grant from a former owner; that the land was acquired for the purpose of constructing and operating thereon a railroad, and that for many years a track has been maintained thereon as part of a continuous railroad extending from the town of Edinburgh to the city of Jeffersonville. It is also alleged that the city authorities have instituted proceedings to appropriate the strip of ground occupied by the railroad track for a public street, and that they will so appropriate it unless enjoined. To this complaint the trial court overruled a demurrer and the city appeals.

The question is one of jurisdiction. If the city officers had jurisdiction, then injunction will not lie, but if there was no jurisdiction injunction is an appropriate remedy. If the city had no authority to seize property previously taken for a public use, there was no jurisdiction, for it is quite clear that jurisdiction over property not subject to seizure cannot exist in a municipal corporation. We do not doubt the power of the legislature to authorize the condemnation of land owned and occupied by a railroad company. The question here, however, is not as to the existence of that power in the legislature, but the question is as to whether that power has been exercised. It is settled beyond controversy that land already appropriated to a public use cannot be appropriated to another public use unless the

City has no authority.

statute clearly confers authority to make a second seizure. *Lake Shore, & M. S. R. Co. v. Cincinnati, W. & M. R. Co.*, 116 Ind. 578-590, 37 Am. & Eng. R. Cas. 430; *Baltimore & O. R. Co. v. North*, 103 Ind. 486, 23 Am. & Eng. R. Cas. 36; *McDonald v. Payne*, 114 Ind. 359. See, also, authorities in notes 2 and 4, Elliott, *Roads & S.* p. 167. It is obvious, therefore, that the ultimate question in this case is whether the statute authorizing municipal corporations to appropriate lands for streets confers power to seize land occupied and used by a railroad company. That it does not is affirmed in the well considered case of *City of Valparaiso v. Chicago, & G. T. R. Co.*, 123 Ind. 467, 42 Am. & Eng. R. Cas. 685. The decision in that case is well supported by authority. It is suggested that there is a distinction between this case and the case of *City of Valparaiso v. Chicago, & G. T. R. Co.*, *supra*, inasmuch as the opening and construction of a street does not destroy the railroad. But there is no ground upon which a distinction can be made. If the city has authority to establish a street the rights of the railroad company may be radically changed. If the land is taken by the city the highway ceases to be a railroad, and becomes a street. The authority over it, and the responsibility of maintaining it, would, in that event, pass from the private corporation, and vest in the municipality. *Louisville, N. A. & C. R. Co. v. Phillips*, 112 Ind. 59, 31 Am. & Eng. R. Cas. 432. It is true that a railroad may exist in a street, but the highway when it becomes a street essentially changes its character; losing, indeed, one character, and taking on another. Not only so, but more, for if the authority to appropriate the land exists, it empowers the municipality to entirely exclude the railroad company from the occupancy of the street. There is nothing in the statute warranting the assumption that a municipal corporation may seize property for a street, and yet suffer it to continue to be part of a continuous line of railroad. The only authority conferred, or professed to be conferred, is to seize property for a street; and, of course, no other can possibly exist. Judgment affirmed.

Appropriation of Railroad Track Lengthwise for Highway.—See note 20 Am. & Eng. R. Cas. 16; *City of Valparaiso v. Chicago & Grand Trunk R. Co.* (Ind.), 42 *Id.* 685.

MACON & AUGUSTA R. CO.

v.

RIGGS *et al.**(Georgia Supreme Court, April 20, 1891.)*

Eminent Domain—Church Property is private property, and is subject to condemnation according to law for railway purposes.

Same—A Deed from Certain Members of a Church, who had no authority to make the same, purporting to convey to a railway company a right of way over land belonging to the church, does not authorize the company to take such land for the purpose designated in said deed.

ERROR from Superior Court, Bullock County.

Gustin, Guerry & Hall, for plaintiff in error.

Brannen & Brannen, for defendants in error.

LUMPKIN, J.—1. The judge below held that the property of a church was not subject to condemnation for railway purposes. It has been settled by this court that church property is private property, and it follows that land belonging to a church may be condemned for public use, such as the building of a railway thereon, just as the property of an individual may be. *City of Atlanta v. First Presbyterian Church (Ga.)*, 13 S. E. Rep. 252 (this term.) See, also, *Lyons v. Planters' L. & S. Bank (Ga.)*, 12 S. E. Rep. 882.

2. The railway company obtained from five members of the church, including a deacon, a deed conveying to it the right to construct its track across the land of the church, and delivered, in payment for said land, a draft for \$175. These members of the church did not own the land, and had no right to make said deed. Afterwards the church deliberately repudiated this action on the part of said members, and returned the draft to the company. The company, nevertheless, was about to proceed to build its railway across the land of the church, having no authority or right so to do except such as may have been conferred by said deed; whereupon Riggs and a number of others, members of the church, and representing it, filed their petition for an injunction against the company to restrain it from encroaching upon the land of the church, and upon the hearing thereof the court granted the injunction. We think the judge did right, because, under the facts disclosed, the company had no right, title, or authority what-

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ever to use this land. We affirm the judgment of the court below, but this ruling must not be so construed as to prevent the railway company, if it sees proper so to do, from instituting condemnation proceedings according to law.

Judgment affirmed.

FORT STREET UNION DEPOT CO.

v.

MORTON *et al.*

(83 Michigan, 265.)

Eminent Domain—Union Depots—Public Use—Constitutional Law.—The Michigan Union Depot Act, authorizing the formation of union depot companies, and conferring on them the power of eminent domain, so stamps the property to be taken with a public character, and imposes upon it a trust for the public use, as to make the grant of the power of eminent domain perfectly constitutional.

Same—Sufficiency of Title of Act.—The Union Depot Act is entitled "An act to authorize the incorporation of companies for the construction of union railroad stations and depots with the necessary tracks and management of the same." *Held*, that this title is sufficient to warrant the conferring of the power of eminent domain upon such corporations.

Union Depot Company—Authority to Run Trains—Title of Act.—That provision of the Michigan Union Depot Act which authorizes companies organized thereunder to run local trains, is warranted by the provision in the title of such act authorizing the construction of depots "with the necessary tracks and the management of the same."

Same—Oath to Jury in Condemnation Proceedings.—Under the Michigan Union Depot Act of 1881, the following oath to the jury in proceedings to condemn land is sufficient, viz.: That they would "justly and impartially ascertain and determine the public necessity for taking and using for the public use the parcel of land described in the petition in this cause."

APPEAL from Wayne Circuit Court.

Proceedings to condemn land for union depot purposes under Act No. 244, Laws 1881. Respondents appeal from an award of \$86,000 in their favor.

Dickinson, Thurber & Stephenson, (Don M. Dickinson, of counsel,) for appellants.

F. A. Baker, for appellee.

MORSE, J.—This is a proceeding taken to condemn lands to the public use. The petitioner is a union depot company, organized under the union depot act of 1881. The property in question in this case is a part of lands Case stated. and premises claimed by the petitioner to be required for its depot and station grounds. In the court below, a jury ren-

dered a verdict that it was necessary to take the property for the public use, and that the respondents were entitled, as a just compensation therefor, to the sum of \$86,000. The respondents appeal to this court. The grounds of such appeal, as summarized by their counsel, are as follows: (1) The union depot act of June 9, 1881, in so far as it confers the power of eminent domain, is unconstitutional and void, for these reasons: (a) The proposed use of land by a corporation which is independent of the railroad laws of the state, and thus is discharged from the obligations imposed by law upon railroad transportation, is not a public use. (b) The act does not confer upon the public at large any right to make use of the proposed passenger depot, and freight warehouse, on any terms. Much less are the terms for such use to the public defined, so as to be certain, beyond doubt, and without condition. (c) Even if the terms to railroad companies were fixed and certain, railroad companies are not the public contemplated by the constitution. The use, and the terms for the use, must be for the people at large. (d) The purpose of the act is not stated in its title. (e) The oath for the jury prescribed by the statute does not cover their constitutional duty. (2) The act does not contemplate more than one union depot in each city or village, and this corporation is not within the clear purposes of the act requiring such companies to provide for all companies entering the city desiring such accommodations. (3) The testimony in the case clearly shows that there is no necessity for taking this property for the public use, and there is no legal evidence to the contrary."

The main argument against the constitutionality of the act conferring the power of eminent domain upon these companies (See Pub. Laws 1881, p. 320; How. St. p. 888) is based upon the proposition that they must acquire such power entirely from the act itself; that the union depot company is not a railroad company; it is not a common carrier; it is a new artificial person deriving all its rights and powers and finding absolutely all its obligations in this, its organic act. Therefore, it is argued it is clearly independent of, and not affected by, the body of the railroad laws and amendments embraced in chapters 91 and 92, How. St., which confer rights and privileges upon railroad companies, and also provide certain and clearly defined reciprocal duties to the people, the imposition of which duties by law is the criterion which makes the use for railroad purposes a public one. It may be admitted for the purposes of this case that so far the contention of counsel is correct, and that we must look to the act itself to support the claim of the company to the right to

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acquire lands by condemnation for public use. But, going further, the counsel also claim that in this act nothing can be found conferring upon the public at large any rights in the contemplated passenger depots and freight houses; that the people at large—the common public—are given by the statute no fixed and definite rights in these depots; and that there is nothing to prevent the companies organized under it from charging what they please for depot services to the public at large. It is said that the provisions of the statute apply only to dealings between the depot companies and the railroad companies who may use the property of the former companies; that this company, for instance, “may shut its doors as against the approaching passenger unless he pays its price to go in, and that there is nothing in the act to compel it to open its passenger depot or its freight house at all to the community in which it is proposed to erect its structure;” that the act only provides for those entering the same by the railroads that terminate or connect with it. The argument is, if we understand it, that the public at large have no rights specified by the act unless they act and use the same under the privileges granted to the railroads. It appears from the record that the Fort Street Union Depot Company was organized for the purposes of furnishing depot and terminal facilities for four different railroad corporations, and for all other railroads that may hereafter desire admittance thereto. The four companies now interested are the Flint & Pere Marquette Railroad Company, the Detroit, Lansing & Northern Railroad Company, the Wabash Western Railroad Company, and the Canadian Pacific Railroad Company. It would seem that a depot built to accommodate all the railroads coming into Detroit, or any considerable number of them, and to be used by them for the same purposes that any one railroad company would use its own single depot, would be when so used, without question, put to a public use, as it has long been settled that a railroad company may acquire, by the right of eminent domain, grounds for its depots and station houses; and this right is not questioned by the counsel for respondents. The act (§ 6) confers, in express terms, this right upon companies organized under it, and provides that such right shall be exercised, and title acquired to the lands sought, in the manner and by the special proceedings prescribed in the act. *Id.* § 3463. Section 28 of the act provides that “all companies formed under this act shall, for a reasonable compensation, provide suitable depot accommodations for the passengers and freights of the railroads terminating or connecting with it, or desiring access thereto, and shall provide suitable tracks therefor without

discrimination in favor of or against such roads. If the corporations cannot agree upon the terms and conditions upon which such accommodations shall be furnished, and the business transacted, the commissioner of railroads shall determine the rate of compensation to be paid for the accommodations required, which shall be uniform to all such railroad companies; but no such rate shall be fixed as will reduce the net annual income of the business of said company to less than seven per cent. on the cost of the property so used.

Sec. 29. Companies formed under this act shall not at any time charge or receive for warehouse or elevator service or use more than the average rates then prevailing at the cities of Toledo, Ohio, and Port Huron, in Michigan, for like service or use. * * *

Sec. 30. Any union railroad station and depot company may, and whenever it is expedient, and such trains will pay the expenses thereof, shall put on local passenger trains to do a local and suburban passenger business; and for such local business upon or to the end of its tracks shall be entitled to charge for each passenger not exceeding four cents per mile; and upon the application of any ten suburban citizens for the establishment for such trains, unless the said company comply with such request, it shall be, upon the same request to the commissioner of railroads, competent for him to investigate and determine whether such trains shall be established, and, if in favor thereof, it shall be the duty of such company to establish and maintain them so long as he shall require it to be done." See *Id.* p. 899, §§ 3485-3487. It seems to me that the rights of the public to use the depots of these companies, their freight houses and elevators, and, in certain cases, their trains, which under certain conditions they must operate, is fixed, definite, and certain. The public at large have the same rights in them as they have in the depots and freight houses and cars of railroad companies in this state; and the representative of the public, the commissioner of railroads in this state, is given powers of control and regulation over them. Their charges must be reasonable, and the maximum is under state control, as in the case of railroads. No additional charges can be imposed upon the public by any railroad company, contracting with the union depot companies, by reason of its agreement with such depot company, while the public is benefited, as well as the railroad companies, by increased facilities of travel and transportation. That a union depot like the one sought to be established by the petitioner in the city of Detroit would be of great and incalculable public benefit, no one who reads this record can doubt. The act stamps the property to be taken with a public character, and imposes upon it a trust for the

public use, which cannot be divested by any act of the incorporators of the company. The law of its existence plainly prevents it from becoming a mere private corporation, or from disregarding its public uses.

The title of the act is as follows: "An act to authorize the incorporation of companies for the construction of union railroad stations and depots with the necessary tracks and the management of the same." It is contended that the title is not sufficient to warrant the authority given in the body of the act to acquire land by condemnation for public use; and, secondly, that § 30 of the act embraces an object not stated in the title,—to-wit, the establishment, maintenance, and operation of railroads, independent of depot purposes, and having no connection with such purposes. Neither of these objections to the title are good. The acquiring of land is a necessary precedent to the construction of depots and railroad tracks, and the means by which it is to be acquired, and the power granted to acquire it need not be stated in the title; and the operation of local trains, under § 30 of the act, is confined to its tracks. This object is stated in the title as follows: "With the necessary tracks and the management of the same." And the building of these tracks in connection with the depot, and the running of trains upon them, are all a part of the same general object, as the construction of the depots and station-houses of the company, to-wit, the increasing of the facilities and comforts of travel, and transportation of passengers and freights.

It is further contended that the oath for the jury, as prescribed by the statute, does not cover their constitutional duty. The statute (§ 9) provides that the jury, "shall take and subscribe an oath that they will justly and impartially ascertain and determine the necessity of taking and using any such real estate for the purposes proposed." *Id.* p. 893, § 3466. Section 3464 (§ 7 of the act) provides that the petition filed for the purpose of acquiring such lands must state, among other things, "that the property described in the petition is required for the purposes of its incorporation, and that the taking thereof is necessary for the public use." *Id.* p. 890. The oath actually taken by the jury was that they would "justly and impartially ascertain and determine the public necessity for taking and using, for the public use, the parcel of land described in the petition in this cause." We think the whole act taken together requires that the oath to the jury should be that they will determine the necessity of taking the land for public use; and, as such was the oath taken here, the law has been fully complied with. The act is not unconstitutional, as §§ 3464 and 3466; *Id.*, taken

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together, require the oath of the jury to be as it was in this case. *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 Mich. 646; *East Saginaw & St. C. R. Co. v. Benham*, 28 Mich. 459.

Nor do we think there is anything in the point made that the act does not contemplate more than one union depot in each city or village. We find no warrant in the act for such contention. We think also that the question of the necessity was properly determined under the evidence by the jury, and we have no disposition to interfere with their award of damages. It is clear to us that the jury was right upon both of these questions, and the proceedings will be affirmed, and the appeal dismissed, with costs of this court. The other justices concurred.

Oaths of Commissioners, Jurors and Viewers to Condemn Land and Assess Damages—Necessity for Oath.—The first duty of commissioners, jurors, viewers, and the like, appointed to act in condemnation proceedings, is to qualify themselves in the manner required by law. One of the qualifications usually prescribed by statute is the taking of an oath, the substance of which is that they will faithfully discharge their duties. See *Lewis*, Em. Dom. § 411. It is well settled that the failure of such persons to take the oath in substantially the form required by law renders the proceedings in which they act invalid. *Elliot v. Lewis*, 1 A. K. Marsh. (Ky.), 514; *Parker v. Lexington & O. R. Co.*, 2 Dana, (Ky.), 227; *In re Bryson's Road*, 2 P. & W. (Pa.), 207; *In re Broad Street Road*, 7 S. & R. (Pa.), 444; *In re Neff's Road*, 3 S. & R. (Pa.), 210; *Fisher v. Smith*, 5 Leigh (Va.), 611; *Keenan v. Commissioners' Court*, 26 Ala. 568; *Frith v. Justices of the Inferior Court*, 30 Ga. 723; *Grimes v. Doyle, Sneed*, (Ky.), 58; *Fisher v. Allen*, 8 N. J. L. 301; *State v. Hart*, 17 N. J. L. 185; *State v. Mayor, etc., of Bayonne*, 35 N. J. L. 476; *State v. Ayres*, 15 N. J. L. 479; *State v. Davis*, 13 N. J. L. 10; *State v. Barnes*, 13 N. J. L. 268.

In New Jersey, the acts of a surveyor of highways before taking the oath of office are void in consequence of the express provisions of the statute. *Hoagland v. Culvert*, 20 N. J. L. 387. And where the surveyors of highways have not taken the oath, the court should grant a rule to show cause why their returns should not be set aside. *State v. Lawrence*, 5 N. J. L. 850. A road viewer should be sworn before he views; it is not enough that he is sworn before hearing testimony. *In re Cambria Street*, 75 Pa. St. 357. If the statute requires a jury appointed to lay out a road to be sworn, this is a requisite which must be complied with; and if the return does not show that they have been sworn, the proceedings will be quashed. *Douglass v. Rawlings*, 4 Haywood, (Tenn.), 111. And so of any proceedings to condemn private property. *Bowler v. Perrin*, 47 Mich. 154. And in proceedings under the statute against the proprietor of a mill to recover damages for flowing lands, it must appear by the record that the jury were sworn as the law prescribes. *Spring v. Lowell*, 1 Mass. 422.

In Missouri commissioners appointed to assess damages for land for a right of way need not, under the general law, take the oath before entering upon their duties; it is sufficient if they make the assessment and return under the same oath. *Cory v. Chicago, B. & K. C. R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183. And in Indiana, it is held that in proceedings to lay out a highway the fact that only two of the three viewers appointed, took the required oath acted, and made the report, does not render the view and report insufficient. *Hayes v. Parrish*, 52 Ind. 132. In an Illinois

case the first report of appraisers for the condemnation of land for the use of a railroad was not approved, and was referred back to the same appraisers. The appraisers without being again sworn made a re-appraisal. *Held*, that it was not necessary that they should be re-sworn. *Low v. Galena & C. U. R. Co.*, 18 Ill. 324.

In order to show the location of a legal road by commissioners appointed to lay it out under a statute requiring them to be sworn before performing their duties, it is necessary to prove that they took the oath before proceeding to make the location. *Crossett v. Owens*, 110 Ill. 378. In order to prove the oaths of road surveyors, it is not necessary to produce the original oaths which are filed with the clerk of the township; it is sufficient to produce copies proved to be true copies. *State v. Hutchinson*, 10 N. J. L. 242.

In Wisconsin, it has been held that it is absolutely essential to the validity of a proceeding to take land for a public road that the jury should act in relation to the matter under the solemnity of an oath. Where the charter of a city does not contain any provision for swearing the jurors, it is in that particular in violation of the constitutional provision which requires that "no municipal corporation shall take private property for public use against the consent of the owner, without the necessity thereof being first established by the verdict of a jury." Where the statute does not require a jury to be sworn before acting in determining the necessity of taking private property for public use, the fact that they are actually sworn does not render their acts any the more valid than if they acted without oath. No indictment would lie upon such oath, however partially or corruptly they might act in their determinations. Such a jury could not determine upon the necessity of taking the property, within the spirit and meaning of the constitution of this state, and consequently the city could derive no right, under the proceedings, to invade the land sought to be condemned, and make a permanent appropriation thereof for public use. *Lumsden v. City of Milwaukee*, 8 Wis. 485.

The Sufficiency of the Oath.—The failure to take the oath in substantially the form prescribed by law, renders the proceedings invalid. *Daveiss v. County Court of Hopkins*, 1 Bibb (Ky.), 514; *Thompson v. Crabb*, J. J. Marsh, (Ky.), 322. And see authorities, cited *supra*. Where it is not required by statute, it is not necessary that the oath taken by viewers shall be subscribed by them. *Hays v. Parrish*, 52 Ind. 132. But in New Jersey, surveyors of highways must not only take, but must subscribe the oath of office required by statute, or the return of a road by them laid out will be quashed. *Fisher v. Allen*, 8 N. J. L. 301. An oath in blank is no legal oath. Each oath and the administration thereof must be separate and individually subscribed. *Matter of Highway*, 16 N. J. L. 391. If the oath of office is signed by a surveyor of highways with his real name, a mistake in the spelling of the name in the body of the oath will not vitiate it. *Hoagland v. Culvert*, 20 N. J. L. 387. The inquisition to condemn property need not assert on its face that the sheriff administered the oath to every jurymen. It is sufficient if the fact appears by his return, and the very language of the oath prescribed by the statute need not be followed, if the substance is preserved. *Pipe Water Canal Co. v. Archer*, 9 G. & J. (Md.), 479. And in West Virginia it is held that although the oath taken by a jury who assess damages in a condemnation case, may not be in the exact form in which such oath should be administered, yet, if it be apparent, that the jury had before them the proper matters for their consideration, and that the plaintiff in error could have suffered no damage because of any informality in the oath, the verdict ought not on such account to be set aside. *Grafton & G. R. Co. v. Foreman*, 24 W. Va. 662, 20 Am. & Eng. R. Cas. 215.

An attorney at law has no authority to administer the oath to viewers; but, it has been held that if it is done in the presence, and by the direction of a person having authority it will be valid and binding. *In re Road in Lower Macungie Township*, 26 Pa. St. 221. And in Iowa, it is held that the fact that the officer who administered the oath to the commissioner, appointed by the board of supervisors to examine and report upon the proposed road, was not empowered to administer oaths, will not defeat the action of the commissioner, nor render the establishment of the road invalid. *Woolsey v. Board of Supervisors of Hamilton County*, 32 Iowa 130.

An oath administered to a jury, before a justice of the peace, on a proceeding to establish a road, in the form prescribed by the statute, with the addition of the words, "if any," as to the damages, does not render the proceedings void. The error, if any, does not go to the jurisdiction. *Hankins v. Calloway*, 88 Ill. 155. And where the statute requires viewers to be sworn to perform their duties "impartially and to the best of their judgment," and their report sets forth that they were "severally sworn or affirmed" in pursuance of the order of the court, it was held sufficient. *In re Road in East Donegal Township*, 90 Pa. St. 190. So where the statute directs that viewers shall be sworn "to perform their duties impartially and to the best of their judgment" it is sufficient if they are sworn "to perform their duties in the premises according to law." *In re Paschall Street*, 81 Pa. St. 118. Where the only mistakes in an oath were the writing "understng" for "understanding" and "faithly" for "faithfully," it seems that the court will overlook them. *State v. Ayres*, 15 N. J. L. 479. So the use of the word 'declare' in an oath is synonymous to 'promise' required by statute, and is not a cause for reversal. *Bassett v. Den*, 17 N. J. L. 432. And where the statute requires an oath "fairly and impartially to execute the duties imposed upon them by this act" and the oath taken is "that they will fairly and impartially execute the duties imposed upon them by the above appointment and make a just and true report according to the best of their skill and judgment," it was held sufficient. *State (Wilkinson Pros'r) v. City of Trenton*, 35 N. J. L. 485.

But where the oath administered to the jury in proceedings to lay out a ditch, does not specify the line of the ditch or its dimensions, but refers to it merely as "Pine Creek Ditch, No. 2," it is insufficient, as it does not apply to a ditch of any specific character and predetermined location. *Chapman v. Clark*, 49 Mich. 305. Where the statute requires the road viewers to perform their duties "impartially and according to the best of their judgment," a report by the viewers that they were sworn "to faithfully discharge their duties" has been held insufficient. *In re Cambria Street*, 75 Pa. St. 357. And in Michigan, it seems that in proceedings to take land for a depot it is not enough for the jurors to swear that they will "examine and determine the necessity of locating and constructing a depot described as follows," etc., since the constitution requires jurors to determine the necessity of taking land therefor, and the compensation to be paid for it. *Bowler v. Perrin*, 47 Mich. 154.

The Wisconsin Act of 1872 required the commissioners appointed to appraise the damages in condemnation proceedings before entering on the duties of their office, to take the constitutional oath prescribed for state officers: to support the constitutions of the United States and this state, and faithfully to discharge their duties to the best of their ability. Defendant's charter, under which the commissioners in this case were appointed, required of them no oath; but they took one to execute the trust reposed in them and discharge the duties imposed upon them as enjoined in said charter, pursuant to the provisions of the charter, to the best of their ability. Held, that their proceedings were void for want of jurisdiction. *Bohlman v. Green Bay & M. R. Co.*, 40 Wis. 157.

What Records and Reports should show as to the Administration of Oaths.

—In Illinois it was held that a recital of road commissioners that they were duly sworn, in proceedings to locate a road, without stating that they were sworn to perform the duties imposed by statute, or to perform any duty whatever, is insufficient to prove that they were legally sworn. *Crossett v. Owens*, 110 Ill. 378. In Iowa the oath administered to the jury impaneled to assess damages should be set out specifically by the sheriff in his return; but whether an omission to do so is fatal, *quaere*. *Walters v. Houck*, 7 Iowa, 72. In Michigan proceedings to condemn private property will be quashed, if the record does not show that the jurors took, before acting, an oath covering their constitutional duties; but they are not required to recite their oath in every report, and such a recital is not sufficient proof of it. *Bowler v. Perrin*, 47 Mich. 154. See also *In re Nicetown Lane*, 11 Phila. (Pa.), 377; case of *Greenleaf Court*, 4 Whart (Pa.), 514.

There is another line of cases which hold that this exactness is not required. Thus in Alabama, the mere recital that the commissioners were sworn according to law is sufficient. *Long v. Commissioners' Court*, 18 Ala. 482; compare, *Keenan v. Commissioners' Court*, 26 Ala. 568. And in Kentucky it is sufficient evidence that the viewers were sworn if their report states this fact. It will then be presumed that they took the appropriate oath. *Wood v. Campbell*, 14 B. Mon. (Ky.), 339. In Mississippi it is held that where a sheriff returned, that a jury of inquest summoned by him to assess damages accruing to the owner of land, by reason of the location of a railroad thereon, "were duly empanelled and sworn according to law, to discharge their duties," the return must be construed as a statement that the proper oath was administered to the jury, and not as a recital of the substance of the oath administered, and therefore that it appeared that the jury were properly sworn. *New Orleans, J. & G. N. R. Co. v. Hemphill*, 35 Miss. 17. In a Wisconsin case, by recitals in the award of commissioners of appraisal of land taken for a railroad, it appeared that they were appointed under the charter of the railroad company (granted in 1866,) and that, before making the award, they took the oath "required by law;" but it did not appear when they were appointed, or what was the form of their oaths. The award was made after chap. 119 of 1872 took effect. *Held*, that it must be presumed, in favor of the legality of their action, that the commissioners were appointed before the passage of the latter act, and that they took the oath required by it. *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538. In a Missouri case in proceedings instituted in behalf of the Hannibal & St. Joseph Railroad Company, under its charter, to obtain the condemnation and appropriation of land upon which said railroad had been located, it was stated in the report of the viewers appointed to assess damages, that before proceeding to examine the damages they took the oath prescribed by the statute, but the oath itself was not set forth, *held*, it not appearing that objection was made to the report on this ground, that the recital in the report was sufficient to show that the required oath had been taken. *Hannibal & St. J. R. Co. v. Morton*, 27 Mo. 317.

In his work on Eminent Domain, Mr. Lewis says concerning this conflict of authority: "The correct doctrine would seem to be that, where the proceedings are under the supervision of a court of record, and the tribunal is sworn at the bar of the court and a record of the fact made as part of the proceedings in the case, a simple recital that the oath was taken as required by law would be sufficient. But, where the only record of the oath is in the report of the commissioners themselves, or in the certificate of a sheriff, clerk, or other ministerial officer, it ought to show what the oath was which was taken, and how it was administered, in order that it

may appear from the facts detailed that the law has been complied with." Lewis. Em. Dom. § 413.

It must appear in the record of proceedings establishing a road, that the commissioners were sworn before they viewed the way. The fact that it appears that they were afterwards sworn will not avail. *Breckenridge v. Ward*, 1 T. B. Mon. (Ky.), 57. But in an early case in Iowa it is held that the acts of road viewers are not void if they omit to state in their report that they had been duly sworn: such statement not being required. The official certificate, or the testimony of the officer who administered the oath required by law to road viewers, is more authentic than the mere statement in the report of such viewers, that they had been duly sworn. *Dollarhide v. Muscatine County*, 1 Greene (Iowa), 158.

A report of commissioners appointed to assess the value of lands taken for a railroad, which fails to show that half or a majority of them met at the time and place ordered before entering on their duties and were properly sworn as required by law, is not sufficient, and it is error to confirm such a report. *Virginia & T. R. Co. v. Lovejoy*, 8 Nev. 100.

Where the opening of a road is contested, and the person contesting it is made a party, and appeals to the circuit court, where evidence is heard, and the judgment of the county court establishing the oath is affirmed, *held* that in such case it is not necessary that the record of the county court, should show that the jury of view was sworn. *Patton v. Clark*, 9 Yerger (Tenn.), 268.

In *Bohlman v. Green Bay & M. R. Co.*, 40 Wis. 157, what the rule would be if the records were silent as to the oath taken by the commissioners of appraisal was left undecided.

Waiver of Failure to take Oath or Defective Oath.—It is not a valid objection to a report of road commissioners, laying out a highway, that one of them had not taken the oath of office, at the time of the issuing of the notices of the hearing, providing the party making the objection appeared at the hearing, without objection at the time. *Towns v. Stoddard*, 30 N. H. 23. And an objection that a jury in proceedings to condemn land for a railroad were not sworn in the manner directed by the statute, comes too late after a verdict, where the party was present when the jury were sworn and made no objection at the proper time. *Rockford, R. I. & St. L. R. Co. v. McKinley*, 64 Ill. 339. If the oath is not taken until the time for the hearing arrives this objection must then be made or it will be considered as waived; it comes too late after the commissioners make their report. *Inhabitants of Raymond v. Cumberland County*, 63 Me. 110.

Where the certificate of the oath of the commissioners is returned to the office of the clerk of the court as required by statute, this is constructive notice to all parties of all facts contained in the certificate, and any party who would object to the qualifications of the commissioners must do so before the hearing, or his objection will be held to be waived. *Wentworth v. Farmington*, 51 N. H. 128.

Where one of the road commissioners did not take the official oath till after the notices were issued, but did take it before the hearing, and the parties appeared, and, without objection, proceeded to the hearing with a full knowledge of the fact; but after an adverse report, excepted and moved that the report be rejected on that account—*Held*, that they must be regarded as having waived the exception by the appearance, and that the motion must be overruled. *Petition of the Town of Gilford*, 25 N. H.

THOMAS & HOUSTON ELECTRIC CO.

v.

SIMON.

(Oregon Supreme Court, Nov. 17, 1890.)

Common Carriers—Classification—Public Use.—Common carriers are classified as carriers of goods and carriers of passengers, because their employment is *quasi* public, and the public have an interest in the faithful performance of their duties.

Eminent Domain—Authority of Electric Railway to Condemn Land.—The provisions of the statute for the condemnation of a right of way have little or no reference to corporations operated as street railways propelled by electricity or horse power for local convenience, and the transportation of passengers, and do not authorize such to condemn private property for a right of way.

APPEAL from Multnomah Circuit Court.

Dolph, Bellinger, Mallory & Simon, for appellant.

Stott, Boise & Stott, for respondent.

LORD, J.—This is an action to condemn a right of way for a street and suburban railway operated for the carrying of passengers. A demurrer was filed to the complaint which was sustained by the court below, and the plaintiff refusing to proceed, judgment was rendered therein, from which this appeal is taken. The contention of the plaintiff is that our statute authorizing the condemnation of land for a right of way contemplates the exercise of such power as much by street and suburban railways propelled by horse power or electricity as railroads where cars are propelled by steam. The argument is that § 3239, Hill's Code, which provides that a corporation organized for the construction of "any railway" may appropriate land for a right of way, by the use of the phrase "any railway," *ex vi termini*, includes street and suburban railway corporations organized to transport passengers only, and propelled by horse power or electricity, as well as railroads authorized to transport passengers and freight, and propelled by steam; that the terms of the statute, viewed as a whole, indicates and imports that it was intended to authorize railway corporations to condemn lands for the use of their road, whether they were organized to carry passengers or freight, or both, or whether they were propelled by steam, or other power. To strengthen the construction that it is not necessary that the railway corporation, however propelled, should

Case stated.

Plaintiff's contention.

be formed to carry passengers and freight to entitle it to exercise the power of eminent domain, and condemn lands for its use, the language of § 3236 is relied upon as showing that this distinction is not observed with reference to navigation corporations authorized to construct portage railways, wherein it reads: "For the purpose of transporting freight or passengers across any portage on the line of such navigation in like manner and with like effect as if such corporation had been formed for such purpose."

To this it is answered that every railway corporation for the construction of a railroad under the statute for the condemnation of lands is a common carrier, and that such a statute, being in derogation of common right, is not to be extended by implication. Section 3254 of the statute, authorizing the condemna-

tion of land for a right of way, provides: "Every corporation formed under this chapter for the construction of a railway as to such road shall be deemed common carriers, and shall be entitled to collect and receive a just compensation for transportation of persons or property over such road." The argument is that as a common carrier of goods for hire, and while a common carrier, it may carry passengers and combine the two employments of carrying goods and passengers, as is almost universally done by railroads, yet, as a corporation for the construction of a railway, it cannot be deemed a common carrier unless it is formed to carry goods and passengers; that the legislature in delegating the right of eminent domain intended only that such railroads should be entitled to exercise it as were common carriers of freight and passengers. Hence a corporation could not exercise the right of eminent domain in the construction of a railway organized to transport passengers only, and not freight. Much of this argument is based on the technical definition of a common carrier as one who undertakes for hire to transport the goods of such as choose to employ him from place to place, so that before a corporation can be deemed a common carrier it must of necessity include in its business the transportation of goods or freight from place to place. There are usually in a railway act some sections which have the effect of putting the railway company on the footing of common carriers, (2 Rob. Pr. 524); but, whether made so by general statute, or by their charters, railroad companies are held to be common carriers, (2 Am. & Eng. Ency. Law, 781). And it is said when they are made so by the express provision of a statute, such provision will be merely declaratory of the law as it already existed. Hutch. Carr. § 67. A common

Answer to
plaintiff's
position.

When rail-
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carrier is such because his duties partake of a public character. "To bring a person," says Judge STORY, "within the description of a common carrier, he must exercise it as a public employment. He must undertake to carry goods for persons generally, and must hold himself out as ready to engage in the transportation of goods for hire, as a business, and not as a casual occupation *pro hac vice*." Story, Bailm. § 495. To constitute one, then, a common carrier, it is necessary that he should hold himself out as such. A carrier of passengers who undertakes to carry all persons who apply to him for transportation is engaged in a public employment, and is a public or common carrier of passengers. "A common carrier of passengers," says Judge THOMPSON, "is one who undertakes, for hire, to carry all persons indifferently who may apply for passage. Railroad companies, the owners of ships, ferries, omnibuses, street cars, and stage coaches are usually common carriers of passengers." Thomp. Carr. 26, note 1. It is true that carriers of passengers are not common carriers as to the persons of those whom they carry. But common carriers are classified as carriers of goods and as carriers of passengers. The reason is their employment is *quasi* public, and the public have an interest in the faithful discharge of their duties. "Every common carrier," said MULKEY, J., "has the right to determine what particular line of business he will follow. If he elects to carry freight only, he will be under no obligation to carry passengers, and *vice versa*. So, if he holds himself out as a carrier of a particular kind of freight, or of freight generally, prepared for carriage in a particular way, he will only be bound to carry to the extent and in the manner proposed. He will, nevertheless, be a common carrier." Wiggins Ferry Co. v. East St. Louis U. R. Co., 107 Ill. 451, 20 Am. & Eng. R. Cas. 9. A common carrier, then, may be either a carrier of passengers or freight, or both. The argument, then, that the plaintiff is not the kind of corporation authorized to exercise the power of eminent domain because it is only a carrier of passengers, and not of freight, would not deprive the plaintiff of its character as a common carrier, and, as such, to be deemed within the statute. This would result in giving to the statute a construction which would include both classes of carriers, but not necessarily that such carriers should combine both employments. It might be engaged in carrying passengers or freight, or both, and still be deemed a common carrier.

But it is apprehended that the safer way to determine whether the word "railway" or "common carrier" as used in the statute is to be confined to railroads operated by steam or railroads operated by other power, such as street railways,

is to look at the context and intent, and in that way ascertain whether the plaintiff is such corporation organized for the construction of a railway as is contemplated by the statute to be invested with the power to condemn lands for the use of its road.

Meaning of
act derived
from context
and intent.

While it is true that the word "railway" may include railroads operated by steam as well as those whose cars are propelled by some other power, yet it is common knowledge that such corporations as belong to the latter class are usually operated as street railways for local convenience. The plaintiff is an electric company and as such we know belongs to the class of corporations operated as street railways for the benefit of the local public. It was so understood at the argument, and the action is described as one to condemn "a right of way for a street and suburban railway for the carrying of passengers." I take it, then, that we are to consider the plaintiff as belonging to this class in determining whether it is such a corporation for the construction of a railway as is intended by the statute to be invested with the power to exercise the right to eminent domain. The statute provides (§ 3239) that "a corporation organized for the construction of any railway, etc., (*Id.* § 3240), "may appropriate so much of said land as may be necessary for the line of such road, not exceeding sixty feet in width, besides a sufficient quantity for workshops, etc., "and in case of a railway a sufficient quantity of such land in addition to that before specified in this section for necessary side tracks, depots, water stations, cuttings, embankments," etc., "and such railway company shall have the right to cut down any standing timber in danger of falling upon its road," etc., "may cross, intersect, join and unite with any other railway," etc., "and may make the necessary turnouts, sidings, and switches, and other conveniences," etc. (*Id.* § 3246), "and all streams and other waters on the line of such road shall be safely and securely bridged except," etc., and (*Id.* § 3254), "every corporation formed under this act for the construction of a railroad as to such road shall be deemed a common carrier," etc. Few, if any, of these provisions have any reference to the class of corporations to which the plaintiff belongs, and was scarcely intended to apply to them. They contemplate and authorize a railway to be constructed where none was built before, through the country, requiring bridges, cuttings, fillings, and embankments, and sometimes tunnels through hills and mountains, and, also, the building of depots and stations for the accommodation of freight and passengers, of engine houses, repair shops, switches, and turnouts to enable the corporation to properly conduct its business. A railroad

corporation, which must avail itself of the benefit of such a law to enable it to do these manifold things to build its railway and put it in operation, may well be considered, from the public nature of its employment, and the interest the public has in the proper conduct of its business, as a "common carrier," without a legislative declaration that it shall be deemed such. But it is plain that the provisions of such a law can have little or no reference to corporations organized and operated as street railways, propelled by electricity or horse power, and intended to accommodate local convenience for the transportation of passengers. They contemplate a track laid upon an established street or highway, and are usually restricted to the bounds of the city, its vicinity, or adjacent towns, and generally derive their authority to lay their tracks upon such streets or highways from the municipality or county, and their construction is regarded by many adjudications as a legitimate use of such streets and highways, and an exercise of the right of public travel. This distinction as to the uses and purposes of each of such class of corporations is thus stated in *Louisville & P. R. Co. v. Louisville City Ry. Co.*, 2 Duv. (Ky.) 178, by ROBERTSON, J.: "A railroad is for the use of the universal public in the transportation of all persons, baggage, and other freight; a street railway is dedicated to the more limited use of the local public for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad." It is not enough that a railway is for a public use to authorize the taking of private property, but the taking must be for a public use within the scope of its undertaking, and the object which it is to subserve. To authorize railroads operated for such purposes to take the private property of the citizen, and appropriate it to its use without his consent, the statutory authority for it must be plainly given; otherwise, the right does not exist. In view of these considerations, we do not think the provisions of the statute for the condemnation of a right of way apply to the plaintiff, so as to authorize it to take private property without the consent of the owner for its own use as a right of way. It follows that the judgment must be affirmed.

Act does not
apply to
electric rail-
ways.

ON REHEARING.

LORD, J.—Further consideration of our statute for the condemnation of a right of way by a railroad strengthens the conviction that it does not extend to or contemplate the business class of railways to which the plaintiff belongs. Few, if any, of its provisions have any reference or application to it as such. Nor has any authority been cited, or argument sug-

gested, other than that the word "railroad" may include railways operated by steam or other power, to give it a different construction. In preference to construing the statute by this method, we thought the safer way to ascertain what the legislature intended was, as SHAW, C. J., said in *Cleveland v. Norton*, 6 Cush. (Mass.), 380, "to take the entire provisions of the act and ascertain, if possible, what the legislature intended." From that point of view, we thought it contemplated a railroad in the larger sense, and such as is considered a highway for travel and traffic, with its necessary adjuncts, and that it was to such railroads that the provisions had reference, and come within the design of the legislative grant, conferring on such the right of eminent domain for the various things specified as indispensable to effect the purposes of its organization, and essential to carry on its business. Nor do we find that the authorities differ with us in this regard. Referring to some of the things which must be regarded as among the acknowledged necessities for operating such a railroad, LE ALLEN, J., said in *Re New York & H. R. Co. v. Kip*, 46 N. Y. 552: "But passenger depots, convenient and proper places for storing and keeping cars and locomotives when not in use, proper, secure, and convenient places having reference to the public interests to be subserved for the receipt and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and dispatch, or after its arrival and discharge, and before its removal by the owner or consignee, are among the acknowledged necessities for the running and operating the railroad, to the proper prosecution of the business in the interests of the public. This may be regarded as indispensable to the accomplishment of the general purposes of the corporation, and the design of the legislative grant." In *State v. Railroad Com'rs*, 56 Conn. 312, 313, 36 Am. & Eng. R. Cas. 510, CARPENTER, J., said: "Depots for passengers and freight are essential parts of a railroad," and that "a railroad is incomplete without them." In speaking of the constitutional power of the legislature to authorize the taking of lands for the construction and operation of railroads, under the statutes of that state, LIBBEY, J., said: "It rests upon the proposition, now well established, that railroads are public highways, the great thoroughfares for public travel and commerce." *Spoilford v. Bucksport & B. R. Co.*, 66 Me. 39. In a note in 29 Am. & Eng. R. Cas. p. 52, referring to Mr. Justice HARLAN'S summing up of the legal status of railroads as public highways for travel and traffic, etc., the writer says: "Whence it may be concluded, and these conclusions are sustained by authority, that (1) railways are *quasi* public corporations, created for the purpose of

conducting the business of common carriers of passengers and property upon their lines of railway, and for no other purpose; (2) as such they are engaged in a public service." From the point of view that railroads are highways for public travel and commerce, it is indispensable to the accomplishment of the purposes of their organization that they should have depots for passengers and freight and all the adjuncts necessary and essential to carry on their business. By looking at the entire provisions of our statute, we find all these matters provided for, and within the design of the legislative grant, whence we conclude that our statute contemplated a railway in this larger or comprehensive sense, and intended to confer the power of eminent domain on such as are highways for the carriage of passengers and freight, and not on the class of railways engaged in the business to which the plaintiff belongs. Our conclusion then is that the motion must be denied.

Exercise by Electric Street Railways of Right of Eminent Domain.—It has been held by the territorial supreme court of Utah that under a statute, authorizing the exercise of the right of eminent domain in behalf of steam and horse railroads, the right may be exercised in proper cases in behalf of an electrical street railway. *Ogden City R. Co. v. Ogden City*, 46 Am. & Eng. R. Cas. 101. It will be observed that the statute in this case was materially different from the Oregon law under which the right was sought to be exercised in the principal case.

"Railroad" and "Railway" as Synonymous Terms.—See note 46 Am. & Eng. R. Cas. 229, 232.

LOCKHART *et al.*

v.

CRAIG STREET R. CO. *et al.*

(*Pennsylvania Supreme Court, January 6, 1891.*)

Electric Street Railway—Additional Servitude—Rights of Abutting Lot-owners.—The use and occupation of the streets of a city, under legislative and municipal authority, for the purpose of constructing and operating therein an electric street railway, with its appendages of poles and wires, does not impose such an additional burden or servitude upon such streets, as renders it necessary to provide for compensation therefor to the owners of abutting property. Accordingly, an injunction will not lie to restrain the construction and operation of such railway on the ground that no provision has been made for securing in advance compensation for damages accruing to such abutting property owners.

Same—Laying Track in Street Paved by Special Assessments.—The fact that the street proposed to be occupied by the electric railway has been paved with asphalt, and the cost thereof assessed against the abutting owners, which pavements will be torn up and replaced with an inferior block pavement, does not affect the right of the municipal authorities to consent to the laying of tracks in such street.

Same—Authority to Construct and Operate Electric Railway.—A company incorporated under Pa. Act of May. 14, 1839, providing for the formation of

corporations for the purpose of constructing street railways for public use in the conveyance of passengers by any other power than locomotives, may construct and operate a street railway, using electricity as a motive power.

APPEAL from Court of Common Pleas, Allegheny County.

Bill in equity for an injunction to restrain the construction and operation of an electric street railway in the city of Pittsburgh. The opinion of the court below was as follows:

"Plaintiff's bill avers, so far as is material to this application, that the plaintiffs are, severally, property owners of lands abutting upon Negley avenue, in the city of Pittsburgh; that said avenue is an improved street of said city, paved only within the last year with a smooth asphalt pavement, paid for by plaintiffs and other abutting property owners, at a cost of some \$132,000, and that the same was paved with the said asphalt pavement with a view, and for the purpose, of diminishing the noises and annoyances arising from travel on the same, and to increase the value of their lands on said streets as places of residence, and the result has been to greatly increase the value of said lands; that the Craig Street Railway Company claims to have the right to enter upon and construct a street railway along and upon said Negley avenue, from the intersection thereof with Roup street, to the intersection thereof of Bryant street, and then returning with a double track on Negley avenue to said intersection with Roup street; that said Craig Street Railway Company threatens and proposes to at once enter upon Negley avenue to construct, maintain, and operate a street railway with two tracks, etc., and to run thereon cars propelled by electricity as a motive power, and for that purpose to tear up and destroy said pavement, and to replace the same with an inferior block pavement, and to erect along the line of said street, in the properties of plaintiffs, a line of poles on each side of said street, and to suspend wires from said poles across the carriage way of said street, and upon such poles to suspend a wire over each of its tracks running lengthwise of said street; that such poles will be located in such position as defendants may select, of the height of about 18 feet, and about 75 feet apart, and the tracks to be laid will be about 7 feet from the curb line, and that said poles and tracks will be a continual trespass upon said properties, and a serious obstruction to the passage of said street; that it will deprive said plaintiffs of easy and convenient access to the street from their properties, and prevent the use of their respective properties under the surface of said street, etc.; that the running of cars along said tracks by the use of electricity will deprive plaintiffs of the quiet which they have heretofore enjoyed, and

which makes their properties especially valuable for purposes of residence, and will greatly damage and depreciate the value of the same. Plaintiffs also aver that the Duquesne Traction Company has made, or is about to make an agreement or lease of some kind for the construction and operation of said passenger railway, and the council pretended to give, by ordinance, the right to enter upon said Negley avenue, and make and construct thereon such motors, cables, electrical and other appliances, and necessary and convenient mechanical fixtures, as said company may, at any time, select, and also to lease the property, rights, and franchises of said Craig Street Railway Company, and to construct and operate the railway of said company. Plaintiffs also aver that a certain other corporation, named the 'Negley Avenue & Roup Street Railway Company,' has been incorporated to lay a street railway along Negley avenue, between the streets aforesaid, and that its charter existed before and at the date of the incorporation of said defendants. It is also averred that the act under which the Craig Street Railway is incorporated forbids the construction of any railway incorporated thereunder within the limits of any city, etc., without the consent of the local authorities thereof, and that the city of Pittsburgh has no power to assent to or authorize any person or corporation to enter upon, use, or occupy said street except such consent or authority be expressed by general ordinance, and that the said defendants do not possess the authority of the city expressed by general ordinance; also that the act of May 14, 1889, under which the Craig Street Railway Company is incorporated, is unconstitutional in that it does not provide a method or remedy whereby plaintiffs may compel defendants to secure compensation to them in advance; and also that the act of 22d March, 1887, under which the Duquesne Traction Company is incorporated, does not empower it to take property of plaintiffs to its use, or, if it does, then that it is unconstitutional; and finally, that neither of said defendants has any right or power, by virtue of their charter, to construct and maintain a street railway over Negley avenue, in manner threatened by them.

"The questions raised by the bill, answer, and affidavits are all merged in one inquiry, to-wit: Have defendants, or either of them, shown the legal right to construct, operate, and maintain a railway on Negley avenue, as proposed by them? This involves the proper interpretation of defendants' charters, the constitutionality of the acts under which they were granted, and the validity of the ordinances of the city of Pittsburgh granting them the right to build and oper-

Electric railway not an additional burden on street.

ate the road in question. It cannot be doubted at this day that the legislature of Pennsylvania has the power to authorize the incorporation of companies with power to build and operate railways with horses over the streets of cities, with the authority and consent of the authorities of said cities, as provided by § 9 of article 17 of the constitution. And it is too late to say that such use and occupation of the streets impose such an additional burden or servitude thereon as renders it necessary to provide for compensation therefor to the owners of abutting property. Nor can it be successfully urged that the proper municipal authorities may not, at their discretion, repair, improve, and change the pavement put down by the city whenever it may be done without any additional cost or expense to the city or property owners, so far, at least, as it may be of any usual and ordinary character. The power over the streets vested in the city authorities seems to be absolute, so far as its exercise is not inconsistent with their ordinary use, and does not take, injure, or destroy the property of adjoining owners. Therefore, I do not think that the fact that the plaintiff secured the paving of a street from the city, for which it paid in the ordinary way by assessment, took away any right the city had to repair or change the pavement or grade of the street, or to exercise over it the same power it has over any other street or alley in the city. There can be no doubt that, under a proper charter, the city had a right to allow the streets to be used for a street railway, with horses as a motive power. So far as the street use proper is concerned, there is no substantial difference between the tracks of such a street railway and one operated by electricity. We may then assume that, in the occupation of the street with tracks, intermediate paving, and the appliances in ordinary use for railways operated by horses, there is nothing of which plaintiff can legally complain. Whatever dust, noise, and annoyance is incident thereto, they must submit to. But there is a material and substantial difference between such a road and the one contemplated by defendants, as regards its relations to plaintiffs' property. The proposed road not only occupies the middle portion of the street or cart way, but will, as a necessary part of its machinery, have iron posts, some 18 feet high, permanently fixed 3 or 4 feet in the ground, along or near the curb of the pavement or sidewalk, upon which will also be placed permanent lines of wire crossing the street, and upon which will also be placed a permanent wire over each track running longitudinally with the street. Do these singly, or altogether, amount to such a taking of plaintiff's property as is prohibited by the constitution, without compensation? The

placing of the wires over the streets do not appear to be a taking of plaintiff's property. The streets are dedicated to the public use, and he has certain special rights, as an abutting owner, but I cannot see how a wire run through the air above the streets can be said to be a taking, injury, or destroying his property.

"But another question arises in reference to the posts placed in the ground for the support of the wires by means of which the cars are moved. It has generally been understood, in Pennsylvania, that the abutting owner had a fee to the middle of the adjoining street, and that the public only has a right of passage over it. *Chambers v. Furry*, 1 Yeates (Pa.), 167; *Lewis v. Jones*, 1 Pa. St. 336. But this must not be taken in

Poles in street not an interference with abutter's rights.

its literal sense, especially in towns and cities. What might be considered an invasion of private right, so far as the use of a highway is concerned, in the country, might not be so in a city. Thus a city, by virtue of its general authority, may build sewers in streets, and the adjoining proprietor is not entitled to have damages assessed as for a new use or servitude. *Fisher v. Harrisburg*, 2 Grant, Cas. (Pa.), 291; *Cone v. Hartford*, 28 Conn. 363; *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *Michener v. Philadelphia*, 118 Pa. St. 535, 22 Am. & Eng. Corp. Cas. 328. In such case, the street is not only used without compensation to the adjoining owner, but he is compelled to pay for the use of the sewer. So the right to lay down gas pipes in the streets, as given by the legislature to municipal authorities, without allowing compensation, has been recognized by the courts; and, while it has not been expressly ruled in Pennsylvania, that I know of, Justice STERRETT, in *Sterling's Appeal*, 111 Pa. St. 35, 11 Am. & Eng. Corp. Cas. 330, while deciding that a gas line was an additional burden which entitled the owner to damages in the country, said: 'As to the streets and alleys in cities and boroughs, there are reasons why a different rule, to some extent, should prevail.' Such has been taken to be the law in cities by common consent. I do not think that any one ever heard of a suit in Pennsylvania to recover damages for injury done merely by running a gas pipe along the street, in front of his premises, under municipal authority. So with water pipes, awning posts, fire plugs, and lamp posts. These all, more or less, impinge upon the absolute right of an owner of the soil, and are not necessary to accommodate public travel, or even consistent with the public right to an unobstructed passage way. And it may be now taken as settled that the owner's rights of abutting property are subject to the paramount right of the public, and the rights of the public are

not limited to a mere right of way, but extend to all beneficial legitimate street uses, as the public may from time to time require. The use of the streets for sewers, tunneling, public cisterns, gas pipes, water pipes, and other improvements necessary for the comfort and convenience of the citizens of cities and towns, so long as they do not substantially interfere with the use of the streets as such, appear to be under legislative and municipal control. Dill. Mun. Corp. § 699. The case of *Taggart v. Newport St. R. Co.*, 43 Am. & Eng. R. Cas 208, (decided this year by the supreme court of Rhode Island), is directly in point, and, if good law, covers the case in hand. My own impression is that the use of poles, wires, and other necessary appliances, such as proposed, being used by defendants, is not, in any respect, a greater interference with the ownership of the adjoining property owner on a street than the use of streets for fire plugs, horse troughs, and lamp posts, which have long and generally been recognized as within the power and control of the city government. Recognizing the right of the legislature and city authorities to authorize the building of railways upon streets of a city, without compensation to property owners, because it is a means of public transportation and accommodation, the necessary and proper apparatus for moving them must be allowed to follow as an incident, unless there is something illegal in their construction or use.

“The proposed construction here is no more illegal by reason of its effect upon the owners of property, so far as actual interference with their rights to use the streets is concerned, than so many lamp posts, and, if compensation could not be compelled for the ground taken by them, neither should it be for the posts supporting the wires in this case. Thus far

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ute.

I have assumed that the charters of the defendants gave the right to defendants to exercise their powers to construct, maintain, and operate a street railway on Negley avenue. But plaintiffs' counsel lay great stress upon the point that, under the acts of assembly cited, defendants have no right to build and operate a road, because no power is conferred thereby to do so. His argument is that no such power is expressly given by the act of 1889, and cannot be implied; but with this I am unable to concur. The act of 14th May, 1889, is entitled ‘An act for the incorporation and government of street railways in this commonwealth,’ and provides that any number of persons, not less than five, may form a company for the purpose of constructing, maintaining, and operating a street railroad on any street or highway upon which no track is laid, or authorized to be laid, with privi-

lege of occupying so much of the street used, or authorized to be used, by any existing charters, as is hereinafter provided, for public use in the conveyance of passengers by any other power than by locomotive. This, leaving out restricting matter of location, would read: "A company may be formed for the purpose of constructing,' etc., 'a street railroad for public use in the conveyance of passengers by any other power than by locomotive.' The method of forming such company is then provided for, and when incorporated it was to have the power and privilege of succession, sue and be sued, make and use a seal, and hold real and personal estate. Section 15 provides: 'No street passenger railway shall be incorporated under this act within the limits of a city, * * * without consent of local authorities,' etc. Section 16 requires the construction, etc., to be commenced within one year after the consent of the proper local authorities, etc. It is true that the act does not say the corporation shall have the right to build, maintain, and operate a railroad, but it does say that a company may be formed under the provisions of the act for that purpose; and to suppose the legislature authorized a company to be formed for a specific purpose, and then to say, when formed, it had no power to carry out the purposes of its creation, because they did not declare in so many words that it should have the power to do the very thing for which it was created, is a refinement of interpretation I do not think warranted by either reason or authority. To my mind the power in the Craig Street Railway Company to construct and maintain a railroad in compliance with the terms of the act under which it was incorporated is clear, and that these defendants have shown a legal right to proceed and construct the railway contemplated by them, unless the failure to provide means by which the plaintiffs may have such damages as they may sustain, assessed and paid, or secured in advance, renders the act unconstitutional. Upon this question I am not free from doubt, but the decided inclination of my mind is that the act is not unconstitutional for that reason, because the use of the streets for the purpose of applying motive power, in the manner proposed, is not such a new use as in cities should be treated as outside the proper use for which streets will be held to have been originally dedicated to the public use. *Taggart v. Newport St. R. Co.*, 43 Am. & Eng. R. Cas. 208, before cited, is exactly in point. The case presented by plaintiffs is certainly not so clear from doubt that a chancellor should grant an injunction summarily stopping a great public improvement, before final hearing, more particularly if the position taken by plaintiffs is correct, and defendants have no

legal right to take possession of the streets, as they are about to do, a common law action will compel them to pay all damages arising to plaintiffs, and thereafter equity would probably afford a complete remedy by which the wrong done them could be fully corrected. Injunction prayed for is refused."

Plaintiffs appealed, assigning for error the court's refusal to grant their prayer.

E. Y. Breck, James F. Robb, W. W. Thompson, and Johns McCleave, for appellants.

John M. Kennedy, William A. Stone, S. A. McClung, Charles H. McKee, and D. T. Watson, for appellees.

PER CURIAM.—The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

Electric Railways in Streets not an Additional Burden Giving Abutting Owners Right to Compensation.—*Halsey v. Rapid Transit St. R. Co.* (N. J.), 46 Am. & Eng. R. Cas. 76, note 89; *Detroit City R. Co. v. Mills* (Mich.), 46 *Id.* 608; *Taggart v. Newport St. R. Co.* (R. I.), 43 *Id.* 208.

FARNSWORTH *et al.*

v.

LIME ROCK R. CO.

(*Maine Supreme Judicial Court, April 21, 1891.*)

Corporations—Charter—Acceptance and Amendment—Waiver of Forfeiture.—The constitutional amendment which took effect in 1875, requiring the formation of corporations to be under general statutes, does not apply to a charter granted by the legislature before the amendment, although amended by it afterwards. The four years, at the expiration of which a charter of corporation becomes by the statute forfeited, unless the company be organized and its business commenced within that time, do not run against a corporation observing the statutory requirement within that time after its charter has been amended. The amendment is a legislative waiver of any forfeiture.

Eminent Domain—Sufficiency of Petition—Agreement of Parties.—A petition praying county commissioners to assess damages for land taken for a railroad need not aver the inability of the parties to agree on the amount of damages, although the charter of the railroad confers jurisdiction on the commissioners in case the parties cannot agree on the amount. The presumption is that they cannot agree.

A Railroad Charter may be Considered as Presumptively Accepted at its date without any record evidence of the fact, when it appears that the grantees afterwards asked for and obtained amendments to their charter and have fully constructed the road.

Eminent Domain—Right of Small Road to Exercise Power—Public Use.—The right of eminent domain is available by legislative grant to a railroad corporation which has constructed a railroad for the carriage of freight to

and from the limekilns in Thomaston and Rockland, and goods to and from stores in the latter place, connecting with the Knox & Lincoln Railroad and running over a portion of its track under a contract between the two corporations, being eight miles in length, of standard gauge, operated by steam power, and costing nearly a half million dollars obtained from the sale of stock and bonds.

REPORT from Supreme Judicial Court, Knox County.

The Lime Rock Railroad Company having applied to the county commissioners for Knox county by petition dated June 18, 1888, to assess the damages caused by their taking the lands of the appellants, under their charter, for railroad purposes, notice was accordingly given. The appellants appeared under protest, moved to have the petition dismissed, and, reserving all objections, etc., denied the commissioners' jurisdiction, and contested their right to act upon the petition for the following, among other, reasons:

"That under the constitution and laws of Maine the said company was not and is not a corporation, and under said laws not authorized to procure a condemnation of said land in any form.

"That the individuals or company doing business under the name of the Lime Rock Railroad Company have never duly organized as a corporation under said constitution and laws.

"That the alleged railroad which said individuals or company propose to construct across the respondents' land is not for such use as gives them the right or authority under said laws to procure a condemnation thereof; and that they had not filed any location of said road in form or substance as required by law, before the date of this petition.

"That, whether said petitioners are a corporation or not, all of the proceedings taken to obtain title to or right to cross said premises are under the said constitution and laws of Maine invalid.

"That said company has no right to construct a railroad over respondents' land, and that said company had no right or authority under said laws to procure a condemnation of land for that or any other purpose."

After the view and a hearing the commissioners overruled the motion to dismiss, and made, on October 17, 1888, an award of the damages sustained by the appellants, who took their appeal to the supreme judicial court.

J. H. Montgomery and W. H. Fogler, for appellants.

C. E. Littlefield, for defendants.

PETERS, C. J.—The charter of the railroad company whose acts are called in question in this controversy was granted by

the legislature in 1861, amended in 1873, and again in 1889. The location was filed and the road built in 1888.

It is argued against its legality that the original charter became lost by non-acceptance before the constitutional amendment of 1875, requiring railroad and other corporations to be formed under general laws, and that any act of revivor passed since 1875 is unconstitutional, in view of decisions of the supreme court of the United States, and especially by force of the doctrine of the case of *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 39 Am. & Eng. R. Cas. 176.

The charter and amendments were expressly accepted by the corporation in 1889, but the facts clearly enough indicate an implied acceptance before that time, and prior to the date of the constitutional amendment. This court has held that no vote of the corporation is necessary, and that acceptance may be implied by circumstances. *Bangor, O. & M. R. Co. v. Smith*, 47 Me. 34. The charter in question is for peculiar purposes, and no class of persons but those incorporated would want it. The charter was asked for, not tendered to them. They desire it for future use, hoping and expecting all the time that the day would be at hand when the road would be built. A very strong evidence of acceptance is that, in 1873, they applied for an amendment of the charter. Subsequent events confirm that evidence. The fact of spending several hundred thousand dollars in constructing the road confirms it. Late events show the earlier intention.

The constitutional amendment does not apply to legislative amendments of charters granted before 1875. The legislature, having granted a charter before 1875, may amend it after that date, the amendment being germane to the original act.

A further objection urged against the validity of the charter is that the company was not organized within four years after the date of its incorporation, forfeiture following for such lapse by the provision of Rev. St. chap. 1, § 6, art. 26. The answer is that the legislature waived forfeiture by the amendments which it granted.

It is objected against the validity of the proceedings of the corporation in its application to have the land damages ascertained, that the application does not allege that the parties themselves could not agree upon the amount of damages, the charter providing for an assessment in case of disagreement. The presumption is that parties cannot agree who do not agree.

Were the proceedings at common law, it would be proper pleading to insert in the petition a negative averment to satisfy the condition embodied in the charter. But it would

Acceptance
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Eminent do-
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Agreement
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hardly seem necessary in proceedings before county commissioners, and, if it were, the omission could readily be supplied by amendment.

The question of the case evidently is whether the principle of eminent domain applies to the purposes for which the charter was granted. Is it an enterprise where the public good is sufficiently subserved to justify the condemnation of private property by the corporation under legislative permission for its use? Right of rail-
road to ex-
ercise power
of eminent
domain.

There must be enterprises occupying such middle ground on this question so near to the boundary line between public use and private use that it may be difficult to say on which side of the line the facts would place them. There must be instances at either extreme, and all the way between extremes. We think the enterprise designed by the company which is virtually the party in this case, though not so significant an example as many railroad enterprises, falls on the side of public use. It is of that stamp.

It is not deniable that a scheme may be more profitable to private owners than it is valuable to the public, and still be a public enterprise. Capitalists are not expected to embark in enterprises which are of public concern, unless there be an adequate private gain. It has frequently been determined that the public use may be limited to place and persons. Not many, compared with the great body of men, participate directly in the use of the telegraph and telephone, the common sewers, public ferries, or the railroads. A street railroad may be a benefit to some persons and work an injury to others. But the community as a body is benefited by such enterprises.

Great liberality has prevailed in granting the use of the public power for the construction of railroads and all kinds of ways. The statutes of our state afford facilities for laying out town ways and private ways, and go so far as to confer power on municipal officers to lay out over private land winter-ways simply for the transportation of merchandise, hay and grain, and lumber.

The charter of the Lime Rock Railroad Company declares the purpose of the corporation to be "the transportation of limestone from the quarries in the city of Rockland and town of Thomaston to the various limekilns in said city and town, together with other freight, with convenient branches to accommodate such kilns, including all quarries and kilns now opened or that may be hereafter opened in said city and town;" and there are general provisions such as are usually inserted in railroad charters, concerning organization, rates, obligations, and liabilities to be assumed.

The road is not designed to carry passengers, it is said.

Neither is a street railroad designed to carry freight, each being, however, a common carrier in its sphere. It is also said by counsel that the charter does not provide that the road shall begin or end at any railroad or highway, and that we cannot go beyond the charter to ascertain that such termini were intended. We should suppose that details of location would not usually be inserted in a charter. While exact designs are not paraded in the charter itself, they are supposed to have been sufficiently represented to the legislature as a justification for its action.

The plan of location produced as a part of the case shows that the road connects with the Knox and Lincoln Railroad, running over a portion of its track, crossing several highways in the course of its route, running in the rear of numerous stores in Rockland, and making close connections with them for delivery of freight, entering the city of Rockland at its south end and terminating at the north end, so as to become a link in a projected line of railroad running northerly to Camden and elsewhere.

It has a transportation contract with the Knox & Lincoln Railroad Company for a term of years. The road is 8 miles in length, to be 10 to 12 miles when completed, of standard gauge, is operated by steam power, has a capital stock of \$300,000 and a bonded indebtedness of \$200,000, has in present use 2 locomotives and 265 freight-cars, and transports rock from 45 different quarries, owned by 75 persons and firms. When completed the capacity of the road and its business will be very much increased, and the road is designed to reach every kiln and quarry in the vicinity of its general route. The public usefulness of such an enterprise may be seen at a glance. The city of Rockland and town of Thomaston are greatly benefited thereby. It will give development and add value to the principal business of the two places, and increase the prosperity of their people.

We have not deemed it best to fortify our positions by authorities, being content to cite a single case, like this case in some respects, but occupying a position considerably in advance of the doctrine promulgated in this opinion,—*Talbot v. Hudson*, 16 Gray, 417. In that case the general question is thoroughly examined.

The case to stand for the assessment of damages.

WALTON, VIRGIN, LIBBEY, HASKELL, and WHITEHOUSE, JJ., concurred.

Authority of Small Railroad Companies Promoted Partially as Private Enterprises to Exercise Power of Eminent Domain.—*Colorado E. R. Co. v. Union Pac. R. Co.* (C. C.), 44 Am. & Eng. R. Cas. 10, note 25.

Sufficiency of Petition in Condemnation Proceedings as to Inability of Parties to Agree.—See *Cory v. Chicago, B. & K. C. R. Co.* (Mo.), 44 Am. & Eng. R. Cas. 183; *Reed v. Ohio, etc. R. Co.* (Ill.), 36 *Id.* 234; *Lake Shore, etc. R. Co. v. Cincinnati, etc. R. Co.* (Ind.), 37 *Id.* 430; *Bowman v. Venice, etc. R. Co.* (Ill.), 14 *Id.* 338.

Authority to Condemn Land is a Question for the Court.—In *London v. Sample Lumber Co.* (Alabama, Nov. 6, 1890), 8 So. Rep. 281, it was held that the court erred in submitting to the jury the determination of the power of the petitioner to take land for a railroad right of way. "This is a legal question which it was the duty of the court to decide."

Lands Under Navigable Waters May be Condemned.—In *Kerr v. West Shore R. Co.*, (New York Ct. of App. June 2, 1891), 27 N. E. Rep. 833, it was held not to be a valid objection to proceedings taken by a railroad company to acquire land for the purposes of its incorporation, that it is under the waters of a navigable stream. The titles which individuals may have acquired in such lands by a grant from the state, may be taken by the exercise of the power of eminent domain, equally with the upland. Citing *In re New York, etc. R. Co.*, 77 N. Y. 248; *In re New York, etc. R. Co.*, 27 Hun. (N. Y.), 57. Affirmed 89 N. Y. 453.

Widening Existing Line of Railway—Limits of Deviation—English Railway Clauses Consolidation Act.—Section 15 of the Railways Clauses Consolidation Act, 1845, as to the distance to which a railway company may deviate from the line delineated on the parliamentary plans, and the decisions under that section to the effect that the distance is to be measured from the *medium flum via* of the line of railway actually laid down to that of the line delineated on the plans, apply only to the construction of a new line of railway, and not to the widening of an existing line. By a special act a railway company were authorized to widen their existing railway, and on the parliamentary plans the existing line of railway was delineated, and there were dotted lines on either side indicating the limits of deviation. The company constructed a portion of their widening outside the limits shown by one of the dotted lines and upon land taken by them from the plaintiff, who brought this action against them for an injunction, but did not show that he had sustained any special damage by reason of their acts. The land of the plaintiff taken by the company was comprised in the parliamentary plans and books of reference. It consisted of two dwelling-houses and their curtilages. The company first gave notice to take such parts of them as were within the limits of deviation, but after receiving a notice from the tenants under the 92nd section of the Lands Clauses Act, requiring them to take the whole of the tenements, and also a letter from the landlord refusing to give up any part which he was not compelled to sell, they gave a fresh notice to take the remainder of the two tenements: *Held*, by KAY, J., upon the construction of the act and reference to the plans, that the company were bound to construct their widening wholly within the limits of deviation, and had exceeded their powers in constructing it outside those limits: But *held*, by KAY, J., and by the Court of Appeal, that assuming that the company had exceeded their powers in the construction of the widening, yet as the land taken was included in the parliamentary plans and no special damage to the plaintiff had been proved, the action could not be maintained. *Held*, also, that as the two houses and curtilages were included in the parliamentary plans and were under the circumstances reasonably necessary to be taken for the completion of the company's works, the company had the power to take them, although they were outside the limits of deviation, and that the notices were valid, notwithstanding the refusal of consent on the part of the landlord. *Finck v. London & Southwestern R. Co.*, L. R. 44 Ch. Div. 339.

Location of Road Within City as Directed by City Council—Power to Condemn Land Outside of Such Location.—In *Tudor v. Chicago & S. S. R. T. R. Co.*, (Illinois, June 15, 1891,) 27 N. E. Rep. 915, it was held that a railroad company which had accepted a city ordinance locating the line of its road through a city, cannot acquire title by condemnation proceedings to land in the city not included within such location, where it is provided by statute (Rev. St. Ill. chap. 24, art. 5, § 1, par. 25), that the city council shall have power to provide for and change the location, grade, and crossing of any railroad within the city. In this case, the ordinance locating the railroad fixed its line "immediately adjacent to and parallel with one of the alleys or alley lines" between certain streets and limited the right of way to a breadth of thirty feet. *Held*, that this ordinance did not authorize the condemnation of a strip of land thirty-one feet wide, of which six feet lie east, and twenty-five feet west of the west line of one of such alleys. Following *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110, 5 Am. & Eng. R. Cas. 253.

Condemnation of Land for the Purpose of Taking Gravel—When the Petition Should be Denied.—The Wisconsin statute in giving the right to railroad companies to take lands necessary for their construction and operation gives them power "to lay out its road not exceeding one hundred feet in width, and to construct the same; and for the purpose of cuttings and embankments, and of obtaining gravel or other materials, to take as much land as may be necessary to the proper construction, operation, and security of the road." Rev. St. Wis. § 1828, subdiv. 4. Under this statute it is held that a railroad company desiring to condemn land for the purpose of obtaining gravel or other materials, must show the necessity for taking it. In the present case, it appeared from the findings of the court that the directors of the company had declared it to be necessary to take the land which adjoined the company's main line at a spur track; that the company intended to take it for the purpose of securing gravel to ballast its roadbed, but that the taking would work great damage to the owner and be injurious to the welfare of the people in the vicinity; that there were other places from which gravel might be obtained; and that the taking would be "unreasonable and oppressive." *Held*, that the petition to condemn should be denied. *Wisconsin Cent. R. Co. v. Kneale*. (Wisconsin, Feb. 24, 1891,) 48 N. W. Rep. 248.

Power to Condemn Land under Charter Authorizing the Taking of Wood, Gravel, etc.—In *Richmond, F. & P. R. Co. v. Knopff*, 86 Va. 891, it was held that where the charter of a railroad company provides only for the cutting, taking and carrying away of any wood, stone, gravel or earth which may be deemed necessary for a railroad company, proceedings to condemn the land, out and out, are unauthorized and illegal.

Prior Negotiation for Land as Prerequisite to Right to Condemn.—The negotiations for the purchase of property required by the statute before instituting proceedings for its condemnation contemplate knowledge on the part of the land owner of the purpose for which the land is wanted. A *bona fide* offer by a railroad company of an amount which it considers a fair price for the land, and a refusal by the owner to accept it, are sufficient negotiations, within the condemnation statute; and it is of no consequence that the agent making the offer had no expectation that it would be accepted. *Fort Street Union Depot Co. v. Jones*, 83 Mich. 415.

Right to Condemn Land for Station Grounds and Side Tracks.—In *Ewing et al. v. Alabama & V. R. Co.* (Mississippi, May 14, 1891), 9 So. Rep. 295, it was held that a railroad company is not limited to the right to take only enough land for its roadbed, but may condemn land for station grounds, side tracks, etc., although the act incorporating it gave it authority to enter upon lands through which it should deem it necessary to make its "railroad."

and in case of failure to agree with the owner of the land, to have the damages by reason of the making "said road" assessed, and declared that the company should be invested with the right to "occupy and use such lands for the purposes of said railroad."

Single Exercise of Right of Eminent Domain does not Exhaust the Grant.

—In *Ewing v. Alabama & V. R. Co.* (Mississippi, May 14, 1891), 9 So. Rep. 295, it is held that the grant to a railroad company of the right of eminent domain is not lost by a single exercise of the right which may be exercised a second time if the necessity arises. The court said: "It is hardly necessary to say that the right of eminent domain—an attribute of sovereignty—can neither be conferred nor exercised for private convenience or corporate advantage. Only the public good will uphold the grant or the exercise of the right. Neither in a first appropriation nor any subsequent one can the power to take private property against the consent of the owner be upheld except in cases where the public good requires it. Where, however, the exercise of this right of eminent domain has been conferred for the public good, for the promotion of the interests of the community at large, and the subsequently arising necessities of the people demand enlarged means and ampler facilities to meet the ends contemplated in the original grant of power, what valid reason can be assigned for limiting the exercise to a solitary act? The grant to railways of the right of condemnation is founded upon the public use. The main lines at least are in the nature of great public highways, constructed to meet the convenience and interests of travel and traffic; and in their construction they are, if the ends of their creation are to be met, to grow with the growth of the country, and keep step with the requirements of the public needs. The meager equipment and small facilities necessary to meet the public convenience and good 50 years ago, when the original corporation, of which appellee is the successor, projected and laid out and built a small railway to connect two towns, small in population, and insignificant in commercial aspects, required but little land for roadbed and side tracks, and station houses and turn tables and repair shops and terminal and other facilities, and no condemnation could have been reasonably contemplated beyond the then necessities. But now, when the small line between Vicksburg and Jackson has stretched across the entire state, and has become an integral part of a great system of railway communication reaching through many states, and when the mighty increase in population and the vast multiplication of commercial interests and enterprises demand then unthought of facilities to fulfill the ends of the railway's creation, shall the company be confined to the miserable and wholly inadequate facilities and means which, at the beginning, met the object for which the legislature gave it life? We do not forget that grants of power of the character under consideration are to be strictly construed. But that is not a strict construction which denies to the agency created the very means which are indispensable to the accomplishment of the ends of its creation. That is the destruction of the agency, and not a construction of the grant of the powers conferred. Whatever is clearly necessary to the execution of the public good contemplated in the creation of the agency is as clearly within the grant as the expressly delegated power. The rigid adherence to the letter of the grant will deny to the railway everything except a mere roadbed. Grounds for side tracks, for station houses, for turn tables, for fuel storage, for water tanks, for repair shops, will be admitted to be absolutely indispensable to the operation of the great public purpose for which the corporation was created; and no syllable touching these necessary adjuncts can be found in the letter of the charter. True, the public uses only the main line of the railway, and all the adjuncts just named are used solely by the railway company, and yet these are as necessary to the attainment of the

public good as the main line itself. There was no necessity for more land than the railway company took 50 years ago. Was it in the legislative purpose to require of its creature that provision which would enable it to look through a half century, and, at the outset, make ample, though then useless, provision for all future public necessities? Rather, shall we not be warranted in holding that when the state, for the public good, authorized this corporation to appropriate lands, it was in contemplation that the power should only be used as necessity arose, and that private property would not thus be taken until the general convenience and public welfare required? This course commends itself as the one imposing fewer burdens on the corporation, and smaller hardships upon the private citizen, whose lands might be needed. 'Sufficient unto the day is the evil thereof' would seem to be of force in the domain of appropriation, as well as elsewhere in human affairs. Without citing authorities in detail, we think the proposition that a single exercise of the right of eminent domain by a railway company does not exhaust the grant, is supported by the weight of judicial opinion as well as by sound reason."

CINNATI, SANDUSKY & CLEVELAND R. CO.

v.

VILLAGE OF BELLE CENTRE.

(*Ohio Supreme Court, March 31, 1891.*)

The Probate Courts of this State are Courts of Record, competent to decide on their own jurisdiction, and exercise it to final judgment, and their records import absolute verity.

Eminent Domain—Service on Defendants—Collateral Attack.—The statute regulating proceedings instituted in the probate court by municipal corporations, to appropriate real property for an authorized public use, confers on that court power to decide when the service on the defendants is complete, and the parties are in court, and its decision on these questions cannot be collaterally inquired into.

Same—Finding of Court as to Notice to Defendant—Impeachment Collaterally.—Where the record in such proceeding shows that the court, after hearing the evidence, found that the defendants therein were duly notified, according to law, of the time, place, and purpose of the application, a defendant, on whom no service was had otherwise than by publication, will not be permitted, in a collateral proceeding, to draw in question the jurisdiction of the court, by proving that, at the commencement and during the pendency of the proceeding, he was a resident of the state.

Eminent Domain—Condemnation of Property Already Taken.—It is a well established rule that property already appropriated, in the proper exercise of the power of eminent domain, cannot be taken for another public use, which will wholly defeat or supersede the former use, unless power to make such second appropriation be granted expressly or by necessary implication.

Same—Land Held by Corporation for Non-corporate Purpose.—But land held by a corporation, whether acquired by purchase or appropriation, which is not employed in nor needed for the proper exercise of its corporate franchises, is not within the reason or operation of the rule.

Condemnation by Municipality of Land of Railroad.—Municipal corporations, under the power conferred by § 2232 of the Revised Statutes, are

authorized to appropriate, for necessary public offices or a prison, land of a railroad company which is not needed or used in the operation of its road or the conduct of its business.

ERROR to Logan Circuit Court.

On the 30th of September, 1881, the Cincinnati, Sandusky & Cleveland Railroad Company, Edward Mains, and J. C. Mains commenced their action in the court of common pleas of Logan county against the village of Belle Centre, to enjoin the defendant from taking possession of certain real estate within its limits, under a proceeding theretofore had in the probate court for the appropriation of the premises for the purposes of public offices and a prison for the village. The allegations and prayer of the petition are as follows:

"(1) The said village of Belle Centre is a municipal corporation organized under the laws of Ohio, and situate in said Logan county. The Cincinnati, Sandusky & Cleveland Railroad Company is, and for ten years last past has been, a corporation organized under the laws of Ohio, owning the line of railroad and the real estate hereafter mentioned.

"(2) In the year 1832 the Mad River & Lake Erie Railroad Company was created by and organized as a corporation under a special act of the legislature of Ohio, with full power and authority to construct a railroad from the city of Sandusky to the city of Springfield, in said state, and to acquire title to and hold all real estate requisite or convenient for right of way, depots, stations, side tracks, turntables, etc., for the construction and convenient operation of said road.

"(3) On the 12th day of June, 1846, one Robert Mitchell and Robert D. Hemphill, being the owners of lot No. 4, in said village of Belle Centre, of which they were the proprietors, proposed to the said the Mad River & Lake Erie Railroad Company to convey to it the said lot No. 4 in consideration that said company would locate and construct its line of railroad through and across the said village, and through across, and upon said lot; which proposition the said company then accepted, and then located and constructed its line of road through and across the said village, and upon and across the said lot. In consideration thereof the said Mitchell and Hemphill then conveyed to the said the Mad River & Lake Erie Railroad Company the said lot No. 4, as a place of depot forever. A copy of the deed therefor is in the record of the proceedings hereinafter mentioned. The said the Mad River & Lake Erie Railroad Company then accepted said lot, and erected thereon a depot building, with appurtenances, for the operation of the said road, which ever since has been and now is maintained thereon. By judicial sale and reorganization under the laws of Ohio, and conveyances

under the same, the title to all the said line of road, its real estate, right of way, and equipments, including said lot No. 4, passed to and is now vested in the said the Cincinnati, Sandusky & Cleveland Railroad Company.

"(4) The village of Belle Centre, on the 6th day of August, 1881, filed in the probate court of Logan county its application to condemn and appropriate for village offices and prison a portion of the said lot No. 4; a copy of which application is hereto attached, marked 'B,' and made part of this petition.

"(5) The plaintiff, said railroad company, was served with no process of notice of said application, as required by law; the only pretended notice being a newspaper publication of which a copy is hereto attached, marked 'C,' and made part of this petition. On the said portion of lot sought to be appropriated a building and structure then was and still is standing, of which the said Edward A. Mains and J. C. Mains, were and are joint owners each of the one undivided third part, and upon whom no notice whatever of the said application and proceeding was ever served, or caused to be served, by the said village or otherwise.

"(6) Plaintiffs say that said portion of lot so sought to be appropriated was then and is part of said lot No. 4, upon which said depot buildings are standing and occupied, the said Edward H. Mains and J. C. Mains occupying said portion temporarily for a mere temporary purpose.

"(7) On the 27th day of August, 1881, the said probate court wrongfully, and without any authority or jurisdiction, illegally made an order of appropriation authorizing and empowering the said village to enter upon and take possession of the said portion of lot No. 4, and erect and maintain thereon village offices and a prison on payment to the plaintiff, said railroad company, of \$234.16 compensation for said portion of lot, and to one Charles Mains \$100 for said structure. Under said illegal and pretended order the said village is threatening to enter upon and take possession of said portion of said lot and said structure, and erect and maintain thereon village offices and a prison, and in addition thereto to erect and maintain thereon business rooms to be occupied as stores for general commercial business and trade; all of which it will do without authority, under said illegal order, to the great and irreparable damage of the plaintiffs severally, unless restrained by order of injunction from this court.

"(8) The plaintiffs say that the said portion of lot is neither indispensable nor necessary for the construction of said village offices and prison; that there are many other lots and parcels of land in said village severally suitable and conven-

ient for such offices and prison, which the defendant can procure at reasonable price either by purchase or judicial appropriation.

"(9) The plaintiffs say that the said village is not, nor is its council, clothed with authority or power to condemn or appropriate said part of said lot; that said probate court had no authority or jurisdiction to entertain or hear said application, or to authorize proceedings under the same to condemn or appropriate any part of said lot for said purposes; that all its said proceedings are and will be null and void; but, if permitted, will be a cloud upon, and may ripen into an occupancy inconsistent with, plaintiff's rights and title, and work the entire forfeiture thereof. During all the months of July and August, 1881, the said corporation plaintiff had and maintained its general office and place of business in the city of Sandusky, in the state of Ohio, constantly in charge of its proper officers, agents, and clerks, and had and maintained its full organization and proper officers under the laws of and within said state, during all said time, and is not nor was a foreign corporation at any time.

"(10) The plaintiffs, and each of them, therefore pray that the said village, its agents and officers, may be restrained, and perpetually enjoined from asserting any estate, or exercising any right, under said order of appropriation, and from taking or maintaining possession of said part of lot No. 4; that the said order and judgment of appropriation be annulled; and that in the meantime a provisional injunction be allowed restraining them therefrom until the final hearing; and for other proper relief."

At the commencement of the action a temporary injunction was allowed as prayed for in the petition, and afterwards, on the 5th of October, 1881, the plaintiffs filed the following supplemental petition, and obtained thereon a further temporary injunction according to its prayer, viz.: "The plaintiffs say that on the 30th day of September, 1881, they obtained an injunction and filed their petition in the above entitled cause restraining the said village, its officers and agents, from erecting or maintaining any building or structure on the southeasterly part of lot No. 4, in said village, and from interfering with or molesting the structure now thereon standing. They now come and file this their supplemental petition against George Young, mayor of said village, Jefferson Wright, Lyman Dow, William Sicke, *et al.*, members of the council of said village, and Thomas Nelson, Thomas Livingston, and M. A. Smith, Jr., and aver against them, all and singular, the matters and facts alleged and averred in their said original petition, as fully as if the same were herein set forth

at large. They further aver that the said Nelson, Livingston, and Smith, wrongfully claiming to act under some pretended authority or contract derived from or had with the mayor and council of said village, are contemptuously disregarding and violating the said order of injunction, and are now engaged in molesting and disturbing the said structure mentioned in the said original petition, and are digging and excavating the soil of part of said lot wrongfully, and are erecting thereon a structure as described and mentioned in their said original petition, in violation of the court's injunction, and without any legal authority or right, and in contemptuous disregard of the authority and order of the said judge, and the court allowing said injunction, which, if permitted to continue, will work an irreparable injury to these plaintiffs. They therefore pray that the said mayor of said village, and members of said village council, Thomas Nelson, Thomas Livingston, and M. A. Smith, be made defendants, and be enjoined and restrained from further proceeding in the said digging, excavation, erection, and molestation, on or about the part of said lot, until the final hearing of their said original petition, or until the further orders of the court; and from doing any of the acts which the said village is now restrained from doing by the said injunction."

The original defendant answered as follows: "Now comes said defendant, and for answer to the petition and supplemental petition of plaintiff denies each and every allegation therein contained, excepting the allegation that defendant is a municipal corporation organized under the laws of Ohio, and situate in said county of Logan, and excepting the allegation that said defendant on the 6th day of August, 1881, filed in the probate court of said county its application to appropriate a portion of the real estate described in plaintiff's petition. Defendant, for a further defense, says: (1) That the part of said lot No. 4, in said village, sought to be appropriated for the purpose in the petition mentioned, has never been and is not now used by said the Cincinnati, Sandusky & Cleveland Railroad Company, or any other railroad company, for depot purposes. That the depot building upon said lot is at the distance of 125 feet from the part of said lot sought to be appropriated as aforesaid. A plat of said lot and its surroundings is hereto attached, marked 'A,' and made part of this answer. That, on the intervening space of 125 feet between said depot buildings and the part of said lot sought to be appropriated, there has for several years been, and now is, a building occupied with business rooms, not in any way connected with the business of carrying on said railroad, and the part of said lot so sought to be appropriated

has never been used and will not be used by said railroad company in carrying on its business, and is not, and never will become, necessary for the purpose of the business of said railroad company. That there is a structure standing on the part of said lot No. 4 sought to be appropriated, but the same was erected since the plaintiffs had notice of the intention of said village to make its application for the appropriation of the same, and said structure was erected for the purpose and with the intent and design of preventing said defendant from making the said appropriation. That in said proceeding for appropriation the said structure was valued at one hundred dollars, and the owners thereof refused to remove the same, and said defendant was compelled to take the same, and pay said sum of \$100 therefor, and proposes to permit to be used temporarily, merely for business, only so much of said structure as for the present is not necessary to be used for the purposes for which the same was appropriated. That, long before the beginning of this suit, defendant, after having paid into court the amount of compensation and damages assessed in said proceeding in the probate court of said county in pursuance of the order of said probate court, took possession of said structure, and the portion of said lot appropriated as aforesaid, and ever since has been, and now is in possession thereof. That, prior to the commencement of this action, the village council of said village appointed a building committee, with full power to contract for the erection of the structure mentioned, and that on the 29th day of September, 1881, and prior to the bringing of this suit, said committee made contracts for the erection and completion of said structure, all of which has been done, none of which contractors ever have been served with notice of any injunction having been allowed herein; and defendant says that, after said contracts were awarded, it had no power to prevent them from completing their contracts as aforesaid. Defendant further says that said the Cincinnati, Sandusky & Cleveland Railroad Company was properly and legally served with notice of the intended application of defendant to appropriate a part of said lot as aforesaid, as well as all other necessary parties thereto. That said the Cincinnati, Sandusky & Cleveland Railroad Company appeared in said probate court by its attorneys, and made and argued motions and examined witnesses during the trial of said proceeding. That the part of said lot No. 4 sought to be appropriated and which was therein appropriated consisted of a strip of ground 25 feet front by 50 feet, out of the south corner thereof. That, if any wrong has been committed against plaintiffs in said proceedings, plaintiffs have a complete and adequate remedy at law.

Defendant further says that said lot so appropriated as aforesaid is necessary for the construction of said village prison and offices. Wherefore defendant asks that said injunction may be dissolved, and said defendant restored to all things it has lost by reason thereof."

The plaintiffs did not reply. Upon the issues joined by these pleadings the case was tried in the court of common pleas, where the plaintiffs prevailed; and the defendant appealed. The circuit court heard the cause at its September term, 1887, and separately stated its conclusions of fact and law as follows: "(1) The court find that the allegations of the defendant's answer relative to the condemnation proceedings, therein mentioned, as having taken place in the probate court of said county, are true; that record of said proceedings was submitted to the court by the defendant; and the court declined and refused to hear any other evidence in the case, except as set forth in the record of said probate court in said condemnation proceedings. (2) Upon the said record the court refusing to hear any other evidence, they find that said condemnation proceedings were regular; and that said plaintiff the Cincinnati, Sandusky & Cleveland Railroad Company was a party thereto; and, upon the facts so found, the court finds the equity of the case to be with the defendants. It is therefore considered and adjudged by the court that the injunction heretofore allowed herein be, and the same is, dissolved, and that the defendant be restored to all things lost by reason thereof. It is therefore considered that the defendant, the village of Belle Centre, Logan county, Ohio, recover of the plaintiff the Cincinnati, Sandusky & Cleveland Railroad Company their costs expended, taxed at \$——."

A motion for a new trial was filed in due time, which was overruled by the court. Exceptions to the ruling were taken by the plaintiff the railroad company, and a bill of exceptions was allowed, from which it appears that "it was agreed by the parties that the several allegations of the plaintiffs' petition in regard to the Mad River & Lake Erie Railroad Company, and the conveyance to it of the said lot No. 4; the terms, conditions, and purpose of said conveyance; the building, operation, and maintenance of said line of road; and the occupancy of said lot No. 4 for depot purposes,—were severally true. It was further agreed that in the year 1866, by judicial reorganization, and the sale and transfer of said line of railroad, and of said lot No. 4, the said the Cincinnati, Sandusky & Cleveland Railroad Company became the successor to the said the Mad River & Lake Erie Railroad Company, and then became and has hence hitherto continued to be the owner of said line of railroad, with all the rights of

its said predecessor, including its rights to and ownership of said lot No. 4, with a depot building thereon standing, which it has continuously maintained and operated ever since. It was further agreed that since the commencement of this action the said temporary lease of the other plaintiffs in the petition mentioned has expired, and that the said the Cincinnati, Sandusky & Cleveland Railroad Company alone prosecutes this action. The plaintiff the said railroad company, to further maintain the issues on its part, offered as evidence the deed to the said the Mad River & Lake Erie Railroad Company for the said lot No. 4, a copy of which is hereto attached, marked 'A,' and made part of this bill of exceptions; and also offered other competent evidence, oral and record, tending to prove the allegations of the petition on its part; but the court refused to hear or consider the same, or any evidence in support of the petition, other than the record of the condemnation proceeding before the probate court in the pleadings mentioned, and directed the defendant to first introduce the record of said condemnation proceeding; to all which ruling and refusal to admit evidence the said the Cincinnati, Sandusky & Cleveland Railroad Company by its counsel then excepted. The defendant then, to maintain the issue on the part of said village, offered and read in evidence the record of the said probate court and of the said condemnation proceeding had therein, a transcript and copy of which, marked 'B,' is hereto attached and made part of this bill of exceptions."

The deed from Hemphill and others to the Mad River & Lake Erie Railroad Company describes lot No. 4, referred to as "being 535 feet front on the railroad and 200 feet back." Such portions of the record of the probate court to which reference is made in the bill of exceptions and judgment of the court as may be deemed important in the decision of the case will be noticed in the opinion. The proceeding in error here is to reverse the judgment of the circuit court.

W. A. West, for plaintiff in error.

McLaughlin & Dow, for defendant in error.

WILLIAMS, C. J.—The probate court is empowered by the constitution, in addition to its jurisdiction in probate and testamentary matters, and others expressly enumerated, to take such other jurisdiction as may be provided by law. It has been given general jurisdiction to make inquests of the amount of compensation, to be made to owners of real estate, when appropriated by any corporation legally authorized to make such appropriation. Rev. St. § 524. The purposes for which mu.

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municipal corporations may appropriate real property are defined, and the mode of procedure in such cases prescribed, by chapter 3, div. 7, tit. 12, Rev. St. When it is deemed necessary by the municipal corporation to appropriate any real property within its limits, for any of the authorized purposes, and the council shall, by proper resolution, declare the intention to make the appropriation, an application may be made to the probate court, and prosecuted therein to final judgment. The notice to the owners whose property is sought to be appropriated, the manner of service of the same, the impaneling of the jury, the conduct of the trial, the verdict and judgment, are all provided for and regulated by the statute. When the assessment of the compensation has been made by the jury, the court shall make such order for its payment or deposit as may seem proper, designating the time and place of payment or deposit, the persons entitled to receive payment, and the proportions payable to each; and the court may require adverse claimants for any part of the money or property to interplead, and fully determine their rights in the same proceeding. The court may also direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce the order for the possession. No doubts that arise concerning the ownership of the property, or the interests of the parties therein, shall cause any delay in the proceeding, or in taking possession of the property. But in such cases the court shall require a deposit of the compensation allowed; and in all cases, as soon as the compensation shall be paid, or secured by a deposit under the order of the court, possession of the property may be taken, and the public work or improvement progress. Provision is also made for prosecuting error, as in other cases, by any parties aggrieved; and also for appeal. The circuit court found that the proceedings had in the probate court, on the application of the defendant here, were regular, and the record shows them to be so. It is clear, therefore, that if the probate court had jurisdiction of the parties, and of the property involved, its judgment established the right of the village to enter upon and hold the property thus appropriated, and to subject it to the proposed uses, and must necessarily operate to defeat the plaintiff's action; for such a judgment, until reversed, is final and conclusive between the parties, and cannot be collaterally impeached. This we do not understand to be seriously controverted. The contention of the plaintiff here is that the probate court, in the appropriation proceedings, acquired no jurisdiction, either over it or its property, and the judgment, therefore, constituted no barrier to the relief

sought by the plaintiff in the court below; and it is not doubted that, unless the probate court had jurisdiction over both the property and the parties, its judgment is void, and may be collaterally assailed. The inquiry, then, is, was there a want of jurisdiction in either particular?

1. The claim of the plaintiff in error, with respect to the want of jurisdiction over its person, as alleged in the petition, is that, during the pendency of the proceeding in the probate court, it was a resident corporation, maintaining its general office and place of business in this state, and that it was not served with notice of the application otherwise than by publication. The statute (§ 2237) provides, that notice of the time and place of the application "shall be given personally, in the ordinary manner of serving legal process to all owners or agents of owners of the property sought to be appropriated, resident of the state, whose place of residence is known; and to all others by publishing the substance of the application, with a statement of the time and place at which it is to be made, for three weeks next preceding the time of the application, in some newspaper of general circulation in the county." The record of the probate court shows that the plaintiff in error was made a party defendant to the application, and, when the time for making the application was fixed, the court ordered that the defendants be duly notified thereof; and that an affidavit in due form was filed, for service by publication upon the plaintiff here, stating that it had no officer or agent upon whom personal service could be made; and also that notice in conformity to the statute was published in accordance with its requirements in such cases, and due proof of publication made. It further shows that, when the application was made, the court, "after hearing the evidence, being satisfied that the owners, and those claiming to own said real estate, have been notified according to law of the time, place, and purpose of the application, and that the necessary statutory steps before making the same have been had," ordered a jury to be drawn, and proceeded with the case. The averments of the plaintiff's petition were controverted by the answer. And it appears from the bill of exceptions that, on the trial in the circuit court, the plaintiff ordered evidence tending to prove the allegations of its petition, but the court refused to hear any evidence in support of the petition, other than the record of the condemnation proceedings. The question is thus raised whether it was competent, in that collateral proceeding, to contradict the record of the probate court, by showing that the plaintiff in error was a resident corporation, having in

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this state officers or agents upon whom personal service might have been obtained, and that therefore, it was not legally served by publication. In *Hammond v. Davenport*, 16 Ohio St. 177, it was held that defendants on whom no service of process was had, otherwise than by publication, will not be allowed, in a collateral proceeding, to draw in question the jurisdiction of the court rendering the decree, by proving that at the commencement and during the pendency of the proceeding, they were residents of the state. And see *Callen v. Ellison*, 13 Ohio St. 446. And the question here is whether that rule is applicable to probate courts in proceedings of the kind we are considering. It seems well settled that the probate courts of the state are courts of record, competent to decide on their own jurisdiction, and exercise it to final judgment, and that their records import absolute verity. *Shroyer v. Richmond*, 16 Ohio St. 455. The class of tribunals to which they belong, and the character of their jurisdiction, are aptly pointed out in the opinion of the court in the case just cited, in the following language: "True, it [the probate court] is a court of limited jurisdiction, and it is equally true that the jurisdiction of each of the courts of the state is expressly limited, either by the constitution or by statute. But, as was said in the case of *Sheldon v. Newton*, 3 Ohio St. 500, 'the distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and exercise it to final judgment, without setting forth the facts and evidence on which it is rendered, and whose records, when made, import absolute verity, and those of an inferior grade, whose decisions are not, of themselves, evidence, and whose judgments can be looked through for the facts and evidence which are necessary to sustain them. Orphans' courts and courts of probate, when constituted courts of record, have uniformly been held of the former description;' and the authorities cited in that case fully sustain these positions."

The statute regulating these appropriation proceedings expressly confers upon the probate court power to decide when the service is complete, and the parties are in court; and its decision upon those questions cannot, we think, be collaterally inquired into; and the circuit court committed no error in refusing to hear evidence offered for that purpose. Besides, it is shown by the record of the probate court that the plaintiff in error, at the time and place fixed for making the application as designated in the published notice, filed its motion in that court to dismiss the proceeding and deny the application for the reason, among others,

that the court had no jurisdiction of the subject-matter. The motion was argued by counsel for the parties, and overruled by the court. This effected the appearance, and gave the court jurisdiction of the plaintiff in error. *Elliott v. Lawhead*, 43 Ohio St. 171.

2. But the claim is made that the probate court had no jurisdiction over the property, because no power has been conferred on municipal corporations to appropriate property owned by a railroad company, for the uses for which the property was sought. This claim is based upon two propositions: *First*, that the property was already devoted to a public use, viz., that of the railroad company, and could not be taken for another and different public use, under the general power possessed by the defendant to appropriate real property for such use; and, *second*, that the express grant of power, by section 2233 of the Revised Statutes, to municipal corporations, to appropriate property owned by a railroad company, for the purpose of opening or extending streets or alleys, under the limitations therein contained, by implication, excludes the power of appropriation of such property for any other purpose. If it be true that the defendant was without lawful authority to appropriate the property for the proposed uses, the judgment of the probate court, of course, could confer none; if, on the other hand, the defendant was clothed with the necessary power, the judgment of the court was not open to collateral attack, but could only be reviewed on error or appeal. In support of the first proposition, it is argued that the railroad company was the exclusive judge of what lands were necessary for its purposes, and that the land in question having been acquired for a depot, and thus devoted to a public use, could not be taken by the defendant for the uses proposed, because the power to so take it is not expressly granted by the statute, nor necessarily implied from the terms of the grant. The statute, in general language, expressly authorizes any city or village "to enter upon and hold real estate within its corporate limits" for "necessary offices," and for "prisons." Rev. St. § 2232. No limitation on the power is found in the statute, either with respect to the ownership or uses made of the property. Under a statute which, in equally general language, conferred power upon cities and incorporated villages to enter upon and take land for the purpose of opening and extending streets and alleys, it was held in *Little Miami & C. & X. R. Co. v. Dayton*, 23 Ohio St. 510, they were authorized to appropriate to those uses lands which were the subject of the franchises of railroad companies: provided the second use for which the land is taken is, in the circumstances

Power of municipality to appropriate railroad property.

of the particular case, reasonably consistent with the former use. The court say in that case that the terms of the grant "are sufficiently broad, *prima facie*, to confer the requisite authority, and there is in such case nothing in the nature of the use to which the land has been appropriated by the railroad company, or in that to which it is proposed to subject it by the second appropriation, which requires us, upon the presumed intention of the legislature, to ingraft upon the general terms of the grant an exception which will prohibit such crossing." According to the rule established by that decision, whether municipal corporations, under the power conferred by section 2232 of the Revised Statutes, can appropriate lands owned by a railroad company, within their limits, for any of the specified uses, must depend upon the circumstances of each case; the criterion in all being whether such appropriation is reasonably consistent with the use to which the property has been subjected by the railroad company. And whether it is so consistent may, in each case, become a question of fact. Though it is not so shown by the bill of exceptions, it may be supposed that it was to this point the plaintiff, on the trial in the circuit court, offered evidence. The nature of the evidence is not disclosed; and under the pleadings its character is not readily conjectured. The lot is described in the deed referred to in the petition, as "being 535 feet front on the railroad, and 200 feet back." That portion of it which the defendant sought to appropriate is 25 feet by 50 feet in dimension. And while it is averred in the petition that a depot building has been erected and is maintained on the lot, it is not alleged that any part of the building is on the portion wanted by the defendant. Nor is it averred that any of that part of the lot is occupied or used for railroad purposes, or that it is in any way necessary for the use or operation of the plaintiff's road or the conduct of its business. The answer alleges that the depot building is 125 feet distant from that part of the lot embraced in the condemnation proceeding; that on the intervening space there is, and for years has been, a building occupied for business rooms, in no way connected with the business of the railroad company; and that the portion of the lot which the defendant was seeking to appropriate has never been needed or used or occupied for any railroad purpose, and never will be, by the plaintiff. The plaintiff not having replied, these allegations of the answer stand admitted. Proof in their support was unnecessary, and proof against them inadmissible. It is not suggested that the proof offered was for any other purpose.

Was the defendant, under these circumstances, destitute of power to appropriate the property so conditioned? It may

be true that a railroad corporation is, in the first instance, the exclusive judge of what lands are necessary for its purposes, and of the quantity of land so needed, and that it may acquire the same by condemnation. But the rightful exercise of its power of eminent domain is limited to the appropriation of such lands as are reasonably necessary for its legitimate uses. Whatever, beyond that, is so acquired, must result from erroneous judgment, or a willful abuse of the power. What reason can there be for exempting such excess, when not employed, nor in any way reasonably necessary in the proper exercise of its corporate franchises, from appropriation for a needed public use? There appears to be none. The power of eminent domain is the right to make private property "subservient to the public welfare," without the owner's consent. It resides in the sovereign, and rests upon public necessity; and though it may be delegated to or exercised through instrumentalities like corporations, it can never be rightfully exercised beyond the public necessity. *Giesy v. Cincinnati, W. & Z. R. Co.*, 4 Ohio St. 308. All property, however held, is necessarily subject to the legitimate exercise of the power.

It seems to be a well established rule, however, that property already appropriated, in the proper exercise of the power of eminent domain, cannot be taken for another public use which will wholly defeat or supersede the former use, unless the power to make such second appropriation be given expressly or by necessary implication. *Little Miami & C. & X. R. Co. v. Dayton*, *supra*. But land held by a corporation, whether acquired by purchase or appropriation, which is not employed in, nor needed for, the proper exercise of its corporate franchises, is not within the reason or operation of the rule. The admissions of the pleadings, in the case before us, show that the property appropriated by defendant for the purposes of the municipality was of this character, and it was therefore, we think, the proper subject of such appropriation. The provision contained in section 2233 of the Revised Statutes, relating to the opening and extending of streets and alleys across railroad tracks, and lands held or owned by railroad companies, first became a part of the legislation of this state by the passage of the act of April 28, 1873. That act did not contain the clause, limiting the appropriation for such purposes, to cases "where such appropriation will not unnecessarily interfere with the reasonable use of such road or land by the railway company." The original act, with this clause added, was carried into the Revised Statutes, as the section above named. Before the enactment of the statute, the case of *Railroad Co. v. Dayton*, *supra*, had been decided; by which

it was established that under a general power, like that granted by section 2232, municipal corporations were authorized to appropriate property held or owned by railroad companies, under substantially the same conditions now embodied in section 2233. This latter section did not, therefore, confer the power to appropriate railroad property. It was not necessary for that purpose. The power existed before that statute was enacted, and independently of it. The statute is therefore simply declaratory of what the law was at the time of its adoption, and was not designed to exclude the power then possessed by municipal corporations under the general grant. Hence we conclude that municipal corporations, under the power conferred by section 2232 of the Revised Statutes, are authorized to appropriate, for necessary public offices, or a prison, land of a railroad company which is not needed or used in the operation of its road or the conduct of its business; and that the probate court had complete jurisdiction in the appropriation proceeding instituted by the defendant, and the plaintiff is concluded by its judgment. The judgment of the circuit court is affirmed.

Condemnation of Land of Railroad Company by Municipal Corporation.—See *ante*, City of Seymour v. Jeffersonville, M. & I. R. Co., and note, p. 38.

Authority of Water Company to Condemn Property of Railroad Company.—St. Mass. 1884, chap. 271, § 2, provides that the Framingham Water Company, shall have all the rights which belong to the town of Framingham to take of the waters of Farm pond, so much as may be necessary to supply said town with water; and may also take, by purchase or otherwise, all necessary lands for raising, diverting, flowing and holding said waters; and in general may do any other acts that are necessary to carry out the purposes thereof. The shore of the pond was owned by a railroad company. *Held* that, inasmuch as the shore was the most suitable and proper place for the erection of a pumping station, and was not actually necessary for the enjoyment of the franchise of the railroad, the water company was entitled to it for that purpose, and also to cross the railroad company's tracks in order to reach the same. *Old Colony R. Co. v. Framingham Water Co.*, (Massachusetts, May 19, 1891,) 27 N. E. Rep. 662. The court said: "The rights intended to be given by the statute are not the same in reference to this land as in reference to land over which the main tracks of the railroad are laid. It may well be held that this statute does not go far enough to authorize the taking of land without which the plaintiff could not operate its railroad. *Boston Water Power Co. v. Boston, etc., R. Co.*, 23 Pick. 360. But the case last cited is an authority which decides that by mere implication, and without express statement, the legislature may be held in a given case to have authorized the taking of land held by a corporation for a public use where the taking does not seriously interfere with the enjoyment by the corporation of its franchise. In the present case the judge found that the land taken is not indispensably necessary for the purposes of the plaintiff, and the plaintiff's conduct in consenting to the erection of the defendant's works, and in permitting them to remain there a long time without objection, shows the same thing. The judge found at the trial that the place selected by the defendant for its pumping station was the most suitable and proper place for it, although it would not have

been impracticable to put it elsewhere. In view of all the circumstances, we are of the opinion that the statute authorized the defendant to take the plaintiff's land for the public use to which it is now being put. The right to cross the plaintiff's tracks to gain access to this land was also properly taken. If the land had been conveyed to the defendant by a deed from the plaintiff, the defendant would have had a way of necessity by implication. If a right of way over the location of the railroad to gain access to this land cannot be taken under any other provision of the statute, it can under the last clause of the section above quoted."

NATIONAL DOCKS & NEW JERSEY JUNCTION CONNECTING R. CO.

v.

STATE (UNITED NEW JERSEY RAILROAD & CANAL CO. *et al*,
Prosecutors.)

(53 *New Jersey Law*, 217.)

Eminent Domain—Condemnation of Right to Cross Lands of Another Company.—One railroad company may condemn the right to cross the lands of another company of the same character, although those lands be necessary for the railroad purposes of the latter company.

Rights Acquired in Condemning Crossing.—In such a condemnation all that is acquired is the privilege or easement of crossing. The place of crossing is to be and remain in the common use of both companies for the exercise of their respective franchises.

Same—Manner of Crossing.—The condemning company may, by its petition in condemnation proceedings, designate a lawful manner in which it will cross the lands of the other company, and make compensation for that single manner of crossing, in which case it can thereafter cross only in accordance with the plan thus designated.

Same—Review of Proceedings by Supreme Court.—When such petition describes the manner of crossing, the legality of the plan and manner of crossing proposed may be reviewed in the supreme court upon *certiorari*.

Railroad Crossed Must Yield to Interference.—Upon due compensation, the present use of the lands for the railroad crossed must yield to any necessary interference by the crossing road, which will not destroy the reasonably fair enjoyment and exercise of the franchises of the company whose lands are crossed.

Manner of Crossing—Assessment of Damages.—Where the condemning company fails to define in its petition how it will cross, and seeks to condemn the privilege of crossing generally, the damages are to be assessed, not only for any manner of crossing at present lawful and necessary, but also for lawful changes in the manner of crossing in the future. In such case, like the case where the manner of crossing is designated, a mere privilege or easement of crossing is acquired, the land being subject to a like privilege or easement in favor of the road crossed.

Conflict Between Companies—Interposition of Equity.—If in the use of such easement, whether it be acquired under proceedings to condemn a crossing in a specified manner or under proceedings to condemn a crossing generally, a conflict should at any time arise between the companies entitled, the interposition of equity may be invoked to secure to each company the enjoyment of its privilege in a just and lawful manner.

Land Which May Be Condemned—Located Route—Description.—In condemnation proceedings by a railroad company the lands sought to be condemned must be within the located route of the condemning company, and must be described with certainty, so that they shall be capable of definite and unmistakable ascertainment. Uncertainty in this respect will vitiate the proceedings.

Authority to Build Short Connecting Railroad.—Under the act to authorize the formation of railroad corporations and regulate the same, approved April 2, 1873, (Revision, 925), and its supplements, a railroad less than a mile may be built, and an independent company may be organized to build a railroad which will connect two existing railroads.

ERROR to Supreme Court. For opinion of Supreme Court see 53 N. J. L. 90, 44 Am. & Eng. R. Cas. 226.

Gilbert Collins and John R. Emery, for plaintiff in error.

James B. Vredenburg and Joseph D. Bedle, for defendants in error.

MCGILL, Ch.—The plaintiff in error was organized in pursuance of the provisions of the act to “authorize the formation of railroad corporations and regulate the same,” approved April 2, 1872, (Revision, 925,) and its supplements, known as the “General Railroad Law,” for the purpose of building a railroad about 2,600 feet long, within the corporate limits of Jersey City. On the 10th of December, 1888, it filed a survey of the route and location of its proposed road. That survey provides that it is to commence at a point in the route of the National Docks Railroad south of Montgomery street, and run northerly several courses, about 1,500 feet, to the lands of the defendants, and then, for more than 1,000 feet, through the defendants’ lands, to a point in the route of the New Jersey Junction Railroad Company, thus forming a direct connection between the routes of the National Docks and New Jersey Junction Railroads. The land of the defendants first traversed by this route is an embankment, immediately adjoining, running parallel with, and elevated about 23 feet above, Railroad avenue, one of the public streets of Jersey City. Upon this embankment, for many years, the main line of the defendants’ railroad was constructed and operated, but that line now being shifted to the north the embankment is occupied by a side track. Immediately north of this embankment, for two or three hundred feet, is ground raised to the grade of the old embankment by filling up a hollow, which the defendants propose to use, in connection with their old main line embankment, as a car-yard, made necessary by the elevation of their tracks through Jersey City. North of this land is an embankment upon which the defendants’ new main line is constructed, and then some partially filled, but unused, meadow. The terminus of the route is at or near the point where the New Jersey

Junction Railroad crosses the defendant's right of way from their main line to their freight depots in Harsimus Cove, over which, upon an elevated iron trestle or bridge, its freight tracks are laid. When the New Jersey Junction Railroad, as it is at present constructed, emerges from under the defendants' freight line, it curves to the east, and ascends to the defendants' main line, making a connection with it, although its filed route shows that it was contemplated that the main line should not curve to the east, but continue in a southerly direction. This curved extension to the connection with the defendants' road is in the location of branch No. 7, represented upon the filed route of the New Jersey Junction Railroad, and although, as constructed, it appears to be a continuation of the main line, it is called "Branch Railroad No. 7." At a point nearly opposite the commencement of this curve, or the place of departure of branch No. 7 from the main line of the Junction Railroad, the defendants have cut through the embankment upon which their new main line is constructed, walled the cut, and carried their main line over it upon a bridge. Through this cut, under the bridge, they have laid two tracks. It is in evidence that their purpose in making this cut was to provide an under grade connection through their land with the National Docks Railroad, but that such intention has been abandoned. The plaintiff now proposes to utilize this cut for its road and to continue it, with suitable walls, southerly, through the defendants' proposed car yard, to Railroad avenue. As the plaintiff's road must cross that avenue above or below the street's grade, (Revision p. 930, § 14,) and it appears to be impracticable for it to cross below the grade, it will be necessary for it, after it passes the defendant's main line, to gradually raise the bottom of its cut through the defendant's land, so that at Railroad avenue it may be the requisite distance above the surface of that street. In that event, to enable the defendants to use their land between their main line and Railroad avenue for a car yard, on both sides of this cut the grade must be gradually raised from the new main line southerly. The maximum of the change thus required will be at the embankment upon which the old main line was constructed, eight feet and a half above the present grade at that point, and three feet and ten inches above the grade of the defendants' new main line.

By its petition for the appointment of commissioners to assess the compensation and damages to be paid to the defendants for the proposed crossing, the plaintiff has specified the manner in which it intends to cross that part of the defendants' lands which appears to be necessary for railroad purposes. The cut, together with that now existing under the

defendants' main line, is to be 524 feet long, walled on both sides with walls constructed of stone resting on solid foundation, 12 feet in width at the bottom and 5 feet in width at the top, with a batter on the inner face of half an inch to a foot. The inner faces of the wall are to be 30 feet apart, at the level of the rails in the proposed road. These walls are to unite with and continue the walls which support the defendants' main line over the cut now existing under that line, and to gradually rise, upon a grade of eighty-two hundredths of a foot to each 100 feet, until, at Railroad avenue, they shall be 31 feet above the crown of the roadbed of that highway. The walls are to be competent to support half through girder railroad bridges at every point, and the defendants are to have the right to use the walls to support such bridges and for all other purposes which will not interfere with the proper use of the plaintiff's proposed railroad.

At this point in the statement of facts two inquiries are presented: *First*, whether in acquiring the crossing over an existing railroad a condemning company may, by its petition, designate the manner of crossing and make compensation for such crossing only, or whether it must condemn the right to cross generally, subject to such restrictions and requirements in the use of the right it may acquire as the court of chancery may reasonably prescribe, making compensation predicated upon anticipated and possible regulation; and, *second*, whether a crossing which interferes with the present use, or intended use, of railroad lands for railroad purposes, is lawful.

The right of one railroad to cross another which is intersected by its route is so plainly essential to its construction for any considerable distance that it has become indisputably established by implication from mere authority to build a railroad between given points, (*Morris & E. R. Co. v. Central R. Co.*, 31 N. J. Law, 205; *National R. Co. v. Easton & A. R. Co.*, 36 N. J. Law, 182; *New Jersey S. R. Co. v. Long Branch Commissioners*, 39 N. J. Law, 28; *State v. Drummond*, 46 N. J. Law, 644, 20 Am. & Eng. R. Cas. 13,) and the general railroad law recognizes this right in railroads incorporated under it in terms so unambiguous as to be tantamount to express authority. (*Revision*, p. 934, § 36; *State v. Hudson Tunnel Co.*, 38 N. J. Law, 548.) The right, however, is by implication from necessity, and its exercise must therefore be limited by the necessity of the condemning road. In the condemnation of a crossing over the lands of another railroad which are necessary for railroad purposes, all that is acquired is a right of way. After such condemnation, the place of crossing remains in the

Questions
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Condemning
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common use of both railroads for the exercise of their respective franchises. The manner of crossing is not to be destructive of the ability of the road crossed to fully, fairly, and freely exercise its franchises. *National R. Co. v. Easton & A. R. Co.*, 36 N. J. Law, 181; *New Jersey S. R. Co. v. Long Branch Commissioners*, 39 N. J. Law, 28; *Lehigh Valley R. Co. v. Dover & R. R. Co.*, 43 N. J. Law, 528, 14 Am. & Eng. R. Cas. 87; *State v. Drummond*, 46 N. J. Law, 644, 20 Am. & Eng. R. Cas. 13. It is not perceived that there can be tenable or sufficient objection to the designation of the manner of crossing in the petition in condemnation proceedings. It is within the power of one railroad to determine by the location of its route where it will cross another, (*National Docks R. Co. v. Central R. Co.*, 33 N. J. Eq. 755,) and it is impossible to perceive a sufficient reason why it may not also determine, within lawful bounds, how it shall cross the other. When a crossing is sought in a manner specified in its petition, the condemning company will make compensation for a crossing in that single manner, which, if it may thereafter be materially changed, may not be so changed without additional compensation for the damage which the change may occasion. The specification upon the record, of the exact method of using the right of way to be acquired, limits the compensation to the damages which may result from such use, and there can be no presumption, as in case of a general condemnation, (*Lewis, Em. Dom.* § 565; *Van Schaick v. Delaware & R. Canal Co.*, 20 N. J. Law, 249; *Ten Eyck v. Delaware & R. Canal Co.*, 18 N. J. Law, 200; *Delaware & R. Canal Co. v. Lee*, 22 N. J. Law, 243; *Trenton Water Power Co. v. Chambers*, 13 N. J. Eq. 199,) that all damages, both present and prospective, including those occasioned by subsequent changes in the plan of crossing, have been considered and allowed. When the petition prescribes the manner of crossing, the effect upon the road crossed being thereby discernible, it is apparent that the legality of the proposed plan may be conveniently and properly questioned before the condemnation proceeds: not by the judge to whom the petition is presented, whose jurisdiction is limited by statute, but by the supreme court, under its general supervisory powers upon *certiorari*. *State v. Hudson Tunnel Co.*, 38 N. J. Law, 548.

At this point the second question suggested—whether a crossing which interferes with the present use or intended use of railroad lands for railroad purposes is lawful—arises. As has been stated, in the acquisition of right to cross the ability of the existing company to fully, fairly, and freely exercise

Manner of crossing.

Compensation to be paid.

its franchises is not to be destroyed. It is not the policy of the law to cripple or destroy one highway for the purpose of erecting another. The purpose is to preserve, multiply, and maintain highways for the development of the country and the general public benefit; and this purpose is especially manifested in the general railroad law, where there exists a prohibition against the condemnation of lands used for railroad purposes, except for a mere crossing. But it does not follow that the precise existing use of the land crossed may not be interfered with. There can be no reason why such use should not yield, if the proposed interference with it is necessary, and of a character that will not destroy the reasonably fair enjoyment and exercise of the franchises of the company whose road is crossed. Ability to enjoy all its privileges and to perform all its duties in a proper and reasonable manner being secured to the latter company, it must, upon being duly compensated, submit to the necessary inconvenience and damage which the crossing may occasion. This view of the law has already found expression in this court, both in *State v. Drummond*, 46 N. J. Law, 644, 20 Am. & Eng. R. Cas. 13; and *State v. Hudson Tunnel Co.*, 38 N. J. Law, 548. In recognizing the right of the condemning company to specify a lawful manner of crossing and to condemn a crossing in that manner, the right to condemn without such specification must not be lost sight of. Where such a company fails, in its petition, to define how it will cross, but seeks to condemn the privilege of crossing generally, the damages are to be assessed as in the case of the condemnation of lands of private individuals for railroad uses, not only for any manner of crossing at present lawful and necessary, but for lawful changes in that manner of crossing in the future. That which is acquired in such a condemnation, as in the case where the manner of crossing is specified in the petition, is a mere privilege or easement in lands, which are subject to a like privilege in favor of the road which is crossed. If in the use of this common easement, whether it be acquired under proceedings to condemn a crossing in a specified manner, or under proceedings to condemn a crossing generally, conflict should at any time arise between the companies, the interposition of equity may be invoked, according to the principles declared in *Delaware, L. & W. R. Co. v. Erie R. Co.*, 12 N. J. Eq. 299, and approved in this court in *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 767, to secure to each the enjoyment of its privilege in a lawful manner.

The proofs in the present case disclose that the projected crossing now considered cannot be effected without consid-

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erable inconvenience and damage to the defendants. It will necessitate a change in the proposed car yard, which will not only be in itself, expensive, but will also render the future operation of the yard more difficult and costly to its managers and dangerous to their employes by reason of heavy grade and of a cut through its center, unless an expensive change in the proposed grade of the defendants' elevated tracks, now in course of construction through Jersey City, is made, and some safe covering for the plaintiff's cut is devised. The necessities of the defendants appear to forbid the abandonment of their yard or its transfer to another locality. But, however serious this inconvenience and damage may be, it does not appear that they will be either destructive to the ability of the defendants to fully and fairly exercise their franchises and perform their duties, or of such character that they may not be adequately compensated in damages. In addition, it appears to be reasonably necessary that the plaintiff's projected crossing shall be effected in the manner and at the place proposed. East of that place is a closely built city, which can be passed through only at an enormous cost; and on the west is a net work of the defendants' tracks and a rocky hill, which present almost insuperable obstacles in that direction. It is not suggested or perceived how a route more desirable or convenient to either the plaintiff or defendants, between the termini of the plaintiff's road could be selected. The projected crossing, then, is not unlawful. In addition to the crossing over the lands of the defendants, which appear to be necessary for their railroad purposes, the plaintiff proposes to acquire a portion of the unused meadow north of the defendants' new main line embankment "twenty-seven and a half feet wide on each side of its center line, except at or near the extreme northerly end thereof, where it requires thirty-seven and a half feet in width on the easterly side of said centre line." The plaintiff's petition contains a particular description of the land thus sought to be condemned, in which the northerly end of that land is described as follows: "Thence curving to the left on a radius of five hundred and forty-six and two-tenths (546 2-10) feet a distance of one hundred and sixteen (116) feet to a point opposite the southerly end of the westerly wall or abutment supporting the tracks of the Pennsylvania Railroad Company, known as the 'Harsimus Cove' or 'Freight' tracks; thence (S., 63° 50' E.) south, sixty-three degrees and fifty minutes east, a distance of twenty-two and a half (22½) feet, to the corner of said last mentioned wall or abutment; thence (N., 26° 10' E.) north, twenty-six degrees and ten min-

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utes east, along the face of said wall or abutment a distance of eighteen and seventy-eight one hundredths (18 78-100) feet to a point five (5) feet westerly from station (25-194 8-10) twenty-five plus ninety-four and eight-tenths feet, being the point of ending of said centre line; thence in a course about (S., 63° 50' E.) south, sixty-three degrees and fifty minutes east, a distance of forty-two and five-tenths (42 5-10) feet, running through the end of said center line, as filed, to a point thirty-seven and a half feet easterly thereof; thence (S., 26° 10' W.) south, twenty-six degrees and ten minutes west, a distance of twenty-seven (27) feet, to a point in the division line between the lands of said Pennsylvania Railroad Company and the New Jersey Junction Railroad Company." It is objected that the land thus described is not within the plaintiff's located route, and that therefore it cannot be taken by condemnation. This view was adopted by the supreme court. The objection grows out of the uncertainty as to the location of the northerly terminus of the filed route. It is stated in the survey of that route to be a point on the line of the New Jersey Junction Railroad, as constructed, which is "the point of departure of branch railroad No. 7 of the last mentioned railroad company, as filed March 2, 1886, in the secretary of state's office." Now, that which is filed in the secretary of state's office exhibits center lines only, and the point of departure of branch No. 7, as there shown, is the point at which the centre line of the branch leaves the center of the main line. If the point thus indicated be the terminus intended, it is clear that the condemnation contemplates the taking of land outside of the filed route of considerable and valuable proportion. The courses given in the survey of the route, however, do not lead to this point, and, if those courses be run the distances given in the survey, without qualification, the terminus would be several feet northwest of the departure of the centre line of the branch from the centre of the main line of the Junction Railroad, upon a curving rail on the westerly side of the westerly track of that road; a point which is not indicated upon any survey of the New Jersey Junction Railroad which is filed in the office of the secretary of state. But the distances in the survey are qualified. It is expressly stated that they are to be taken "more or less;" and the survey provides that the terminus is to control the distances. The terminus is not a visible monument, but it is capable of ascertainment, and by the express provisions of the survey it is given the character of a visible monument. The engineer of the plaintiff in error explains that the words "more or less" were designed to make the distances, which were expressed in figures, sufficiently elastic

to reach the exact point on the curved westerly rail of the New Jersey Junction Railroad, as that railroad is now constructed, where it may be determined that the branch No. 7 departs upon that rail from the main line, the exact point being uncertain. The courses of the survey lend credence to this explanation, but the description of the terminal point is at decided variance with it. It is impossible to reconcile all parts of the description. It is suggested that the court should consider the description of the terminal point elliptical, and supply words to make it conform to the theory of its meaning advanced by the plaintiff. We perceive no warrant for so doing in view of the fact that the terminal point intended is not identified. It is deemed that the great value of the property and the conflict of important railroad interests at this point render it necessary that the disputed terminus should be so described that it will be capable of definite and unmistakable ascertainment. As it is now designated it is so indefinite and uncertain that it is impossible to say that the land sought to be condemned is all within the plaintiff's located route. We think that this uncertainty vitiates the proceedings reviewed.

The defendants present two other objections to the proceedings considered, which demand attention because they question the plaintiff's legal existence. The first is that the general railroad law does not authorize the construction of a railroad less than a mile in length, and the second is that a connection between two railroads incorporated under that law cannot be accomplished by an independent corporation. It is argued in support of the first of these propositions that the rating of the deposit to be made with the state treasurer at the time of incorporation, and the charges that the company may make for transportation, and the minimum of the company's capital stock, by the mile, conclusively exhibit the legislative intent that the railroads contemplated by the law shall be more than a mile in length. The statute expressly provides for two classes of railroads,—those more than 10 miles long and those less than 10 miles in length; but it makes no minimum limit of length in the latter class. The design of the law is to subserve the public good. Consequently every railroad incorporated under it is expressly required to transport such passengers and property as shall be properly offered for transportation at its depots. Revision, p. 932, § 26. The test of the road intended is its public use and benefit, and not its extent or length. *Long Branch Commissioners v. West End R. Co.*, 29 N. J. Eq. 566; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755, 766. The law makers apparently

Authority to
construct
short connect-
ing road.

considered the utility of a legislative limitation of the length of a railroad to be so questionable, in view of the fact that capital will not seek unremunerative investment and duties, that they did not impose it. This interpretation of the statute is now too well established in our courts to be disturbed. The public convenience and benefit being subserved, which is exhibited by the investment of capital, the railroad may be less than a mile in length. The second objection—that a connection between two railroads cannot be accomplished by an independent corporation—is claimed to be supported by the provisions of the twenty-third section of the general railroad law, which it is said contemplates an extension of or an addition to an existing road, to form a desired connection, and by the supplement of 1880 (P. L. 94) to the “Act concerning railroads,” (Supp. Revision, p. 823, § 7.) The latter act appears to be directed to specially chartered railroads. But at best both the laws referred to merely confer power to make railroad connections. I fail to find anything in the statute which prohibits the connection of two railroads by an independently incorporated company. In *Commissioners v. West End R. Co.*, above cited, it was said that the twenty-third section of the general railroad law expressly declares that a corporation whose road shall be constructed under this law shall have the right to connect its roads with any railroads within this state or any other state, and that the sole purpose of the acquisition of corporate functions by the defendants in that case was to build a connecting road between two existing roads, and that such purpose is specially legalized. We do not think that this objection is well taken. Other objections go merely to the regularity of the plaintiff's proceedings, and, as we think that those proceedings are vitiated by the uncertainty whether the land which the plaintiff seeks to condemn is within its located route, it is not necessary to consider them. Our conclusions upon the points stated lead to an affirmance of the judgment of the supreme court.

PER CURIAM.—The judges voting to reverse the judgment of the supreme court in the above entitled cause concur in the opinion delivered by the chancellor, except so far as it holds the petition to be defective. Deeming the petition sufficient, we think the judgment below should be reversed.

For affirmance: MCGILL, Ch., BEASLEY, C.J., and DIXON, VAN SYCKEL, J.J.

For reversal: BROWN, CLEMENT, COLE, SMITH, and WHITAKER, J.J.

Condemnation by One Railroad of Crossing Over Another.—See *United N. J. R. & C. Co. v. Nat. Docks, etc. R. Co.*, (N. J.), 44 Am. & Eng. R. Cas. 226; *Richmond & D. R. Co. v. Durham & N. R. Co.*, (N. Car.), 40 *Id.* 488; note 39 Am. & Eng. R. Cas. 16.

Power of Railroad Company to Condemn Land of Another Company Acquired by Purchase and not by Eminent Domain.—In the case of *In re Providence & W. R. Co.*, (Rhode Island, March 14, 1891), 21 Atl. Rep. 965, it was held that a railroad company cannot, under a general power to condemn land for a right of way, take land occupied by the main line and necessary side tracks of another railroad company, although such land sought to be taken was acquired by the latter company by purchase, and not by the exercise of the right of eminent domain. The court said: "As I understand their contention, it is that, so long as the defendant railroad companies obtained the land now proposed to be taken and condemned by the petitioner, by purchase,—Mr. Benton says they were so obtained,—instead of by the exercise of the right of eminent domain, it is subject to the exercise of that power on the part of the petitioner without any express authority therefor in the charter, to the same extent as the land of any private individual. But I fail to see, upon principle, why the lands held by a railroad company for the necessary and ordinary uses of the road, which have been obtained by it by purchase, under the express power given in its charter for this purpose, should not be equally exempt from the exercise of the power of eminent domain on the part of another railroad, seeking to obtain said lands for similar purposes, unless expressly, or by necessary implication, authorized to take and condemn said lands, (which is not the case here), as though the same had been obtained by condemnation. Such lands are just as essential for the road, they are used by it precisely the same, they are impressed with a public trust, and the effect of taking them away would be precisely the same, as though they had been obtained under the greater power given therefor. It is true that no cases have been produced in which this doctrine has been directly held, although in *Boston & M. R. Co. v. Lowell & L. R. Co.*, 124 Mass. 368, it appears by the opinion that part of the land which the defendant was restrained from condemning, because already appropriated to a public use, was obtained by purchase. But the particular question now under consideration seems not to have been directly raised in that case or in any other that I have been able to find. The case *In re Boston & A. R. Co.*, 53 N. Y. 574, is certainly very nearly in point. In that case the petitioner proposed to take and condemn land held by the village of Greenbush as and for a public park, which land was not obtained by said village under the power of eminent domain, but by gift; but the court held that in the absence of express authority, this land, being already in public use under the sanction of the law, could not thus be taken. See, also, *Anderson v. Rochester, L. & N. F. R. Co.*, 9 How. Pr. (N. Y.), 553. The case of *In re New York, L. & W. R. Co.*, 99 N. Y. 12, 23 Am. & Eng. R. Cas. 43, although not precisely parallel, yet I think proceeds upon a similar theory. In that case the land proposed to be taken by the petitioner *in invitum* was held by the defendant by purchase, said defendant having no power under its charter to obtain it by condemnation. Defendant was a steamboat company, duly incorporated and engaged in the business of carrying by water passengers and freight on the Great Lakes, and using the property in question as a dock or wharf for the landing and delivery of freight. The question before the court was whether the use of corporate property for the public convenience and for purposes of a *quasi* public character was sufficient to protect it from the grasp, under the right of eminent domain, of another corporation whose property was held for similar public use. The court held that it was not, and mainly on the ground that the land held by the defendant was not

impressed with a public trust. 'It might use the lands here in question,' said the court, 'wholly for the purpose of building and equipping the vessels of its line, and then apply them solely to private uses.' 'The test appears to be, not what it does, or may choose to do, but what, under the law, it must do, and whether a public trust is impressed upon it.' It does not so hold its property impressed with a trust for the public use, unless its charter puts that character upon it so that it cannot be shaken off.' Applying this test to the case at bar, it seems to me that the lands of the defendant railroad companies must, under the circumstances, be exempt."

TWELFTH STREET MARKET CO.

v.

PHILADELPHIA & READING TERMINAL R. CO.

(*Pennsylvania Supreme Court, May 25, 1891.*)

Eminent Domain—Power to Condemn Property of Market Company.—

The rule that one corporation cannot take by the right of eminent domain the property of another held for public use without express legislative authority, does not exempt the property of a market company, which is in every respect a private corporation, from the exercise of the right of eminent domain by a railroad company.

APPEAL from Court of Common Pleas, Philadelphia County.

The opinion of the court below, THAYER, J., is as follows:

"The right of eminent domain is the right of a sovereign state to take private property for public use, and in order to promote the general welfare. It is called 'eminent domain' because it is superior to all private rights, and is an exercise of the sovereign authority which of necessity resides in all governments for the common benefit and welfare of their citizens.

It was assumed by the framers of the constitution to be a right necessarily inherent in every sovereign state. Accordingly they did not put into the constitution any express grant of such power to the legislature, while they took care to prohibit, by express words, any limitation to its exercise which should exempt corporations from its application to their property in common with that of individual persons. Article 16, § 3, declares: 'The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals.' If this power which resides in the state is a great power, it cannot be denied that it is also a necessary power. If it may seem in one aspect of it to be a despotic power, it cannot be denied that

Nature and
importance
of eminent
domain.

it is at the same time a beneficent power, and absolutely essential to the public welfare. Without it a road could not be opened, a railroad or telegraph line constructed, a canal dug, a bridge built, a new street laid out, or an old one altered, and all public improvements would come to a standstill. It oppresses no one, for its exercise is always accompanied by adequate and full compensation. It is guarded by just restrictions, and its abuse is prevented by adequate limitations. This power the state, as it had the right to do, has delegated to the defendants in these cases, who were incorporated under the general railroad law of April 4, 1868. 2 Purd. Dig. p. 1414. By § 5 of that act, they are empowered to exercise all the rights, powers, and privileges of the act regulating railroad companies, approved February 19, 1849, by § 10 of which (2 Purd. Dig. p. 1423, pl. 47), they are authorized to locate such route for their railroad 'as they may deem expedient, not, however, passing through any burying-ground or place of public worship, or any dwelling-house in the occupancy of the owner thereof, without his consent: * * * and to enter upon and occupy all land of which said railroad, or their depots, warehouses, offices, toll-houses, engine, and water stations, or other buildings, before mentioned, may be located, or which may be necessary or convenient for the erection of the same: * * * provided, that before such company shall enter upon or take possession of such lands they shall make ample compensation to the owner thereof, or tender adequate security therefor.' This, then, is the warrant from the state, by virtue of which the defendants propose to take the land belonging to the several plaintiffs in these cases, for the purpose of making the same the terminus of their line, and erecting thereon their depot; the city of Philadelphia, so far as its consent may have been necessary, having, by its appointed authorities, also given its consent thereto. The plaintiffs allege that their property cannot be lawfully taken without their consent, because they are corporations with charters which empower them to build, hold, and maintain market-houses for the public accommodation; that this use of their property is a public use; and that, in accordance with the established law upon this subject, one corporation cannot take, by the right of eminent domain, the property and franchise of another corporation held for public use, without an express authority from the legislature so to do, as an authority necessarily to be implied from the grant to them of their power, and arising out of the absolute necessity inherent in the grant, and not created by themselves. So far as relates to that portion of the objection made by the plaintiffs to the

Plaintiff's
position.

proceedings of the defendant which rests upon the corporate character of the plaintiffs, and the privileges secured to them by their charters, it is unnecessary for me to enter into any discussion; for the reason that it is too well settled to admit of debate that, under the right of eminent domain, not only the lands of a corporation may be taken for such a public use as a railroad company, but their franchise also. It would be a mere affectation of industry for me to parade the many cases decided in Pennsylvania and the other states of the Union which affirm this proposition, especially in view of the express words of the constitution already quoted, which subject all franchises as well as other property of corporations to the exercise of this right. It must, however, be conceded that the plaintiffs are right in declaring that neither the franchise of a corporation existing for a public use, in the legal and proper sense of the words, or the lands which are necessary for the enjoyment of such public use, can be taken under the delegated power of eminent domain, without a clear and express authority from the legislature to that effect, or an authority necessarily implied from the grant. It must further be conceded that there is not in the act of February 19, 1849, any express grant of authority to take lands held by other corporations for public uses; nor have I been convinced, notwithstanding the ingenious argument made by the defendant's counsel, that the facts in the present cases show any such absolute necessity of taking the plaintiff's land as would give rise to an implied authority,—such a necessity as arises out of the nature of the case, and is not of the defendant's own creation. On the other hand, nothing can be plainer than that it is not necessary for the defendant to show any such absolute necessity for the taking, unless the plaintiff's have made good their claims to be corporations existing for public uses, within the true legal meaning of those words.

“Now, the meaning of these words, ‘for public use,’ has been frequently determined in the cases in which the question of the validity of the grant of the right of eminent domain has arisen, where it was necessary to decide whether the purpose for which the property was to be taken was for ‘public use.’ Clearly the words do not mean that every use is a public use from which the public may incidentally and temporarily derive an advantage or benefit or convenience, during the pleasure of the owner of the property, and from which they may be excluded at the mere caprice of the owner. If this definition were accepted, any man's property might be taken upon the shallowest pretense of a public use. The test whether a use is public or

Effect of corporate character of plaintiffs.

Whether use is public.

not is whether a public trust is imposed upon the property, whether the public has a legal right to the use which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner. A particular enterprise, palpably for private advantage, will not become a public use because of the theoretical right of the public to use it. The question is whether the public have a right to the use. The general public must have a definite and fixed use of the property—a use independent of the will of the private person or corporation in whom the title is vested; a public use which cannot be defeated by the private owner, but which is guarded and controlled by the law. The true criterion by which to judge of the character of the use is whether the public may enjoy it by right, or only by possession. The test is not what the corporation owning the land may choose to do, but what under the law it must do, and whether a public trust is impressed on the land. A franchise for such a public use cannot be granted away. The question of a public use is not affected by the agency employed. It is no more of a public use for being held by a corporation. To constitute a public use, the property must be under the control of the public, or of public agencies, or the public must have a right to the use.

“Let us now turn to a brief examination of the nature of the rights possessed by the market companies who are plaintiffs in these cases. The Farmers' Market Company was incorporated by an act passed March 19, 1859. By the first section they were empowered to acquire such real or personal estate as they might deem necessary for the maintenance of a market house in the city of Philadelphia, with full power to sell, mortgage, or convey the same at their pleasure. Section 2 declares the purpose of the corporation to be to erect and maintain a building and stalls to be used as a public market house, the same to be leased, rented, or disposed of on such terms and conditions as the managers should determine. By § 3, the capital stock was not to exceed \$250,000, in shares of fifty dollars each: and the affairs of the company, by § 4, were to be managed by a board of nine managers elected by the stockholders. The Twelfth Street Market Company, by an act passed April 6, 1864, was incorporated ‘with all the powers, privileges, and immunities contained in the act incorporating the Farmers' Market Company. Its capital stock was not to exceed \$300,000, in shares of fifty dollars each. The charters of the two companies were therefore in all essential respects identical. They are both private corporations, authorized to build houses and stalls to be used as public market houses, for the sale of meats, vegetables, victuals and provisions, with

Nature of
rights of mar-
ket compa-
nies.

the right to rent the stalls for whatever prices they may choose, or sell out and quit the business whenever they please. We may ask, then, as the supreme court pertinently asked in *Girard Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 251: 'What rights have the public in and upon these properties other than what it would have did the property belong to a private individual?' 'We understand very clearly,' the court goes on to say, 'the relation of a turnpike road, a canal, or railroad to the public. The people of the commonwealth have the right of way over them, which may be exercised regardless of the will of the corporation owning them. They are highways, and the companies operating them have the rights of eminent domain conferred upon them only because of this direct interest which the public has in them. But in the works of this corporation the community at large has no other, no further, interest than it has in the storehouses of private individuals. It may receive the grain of one person, and refuse that of another, or it may, at its own will, suspend operations, and shut out the public altogether. Its organization is all that it has received from the public. Beyond this, the public has no special interest in it, and when the organization disappears there is nothing left of a public character, or anything over which the commonwealth has control.' Every word of this is as applicable to the corporations plaintiff in these cases as it was to the *Girard Storage Company*. 'Corporations are divided,' said THOMPSON, C. J., in *Foster v. Fowler*, 60 Pa. St. 27, 'into public and private corporations; that is, into those which are agencies of the public, and directly affecting it, and those which only affect it indirectly. The public is directly interested in the results to be produced by the former, and the use of them cannot be disturbed by the seizure of the property essential to their operations by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking to accommodate the public. This direct benefit to and accommodation of the public very clearly distinguishes this class of corporations from private corporations, in which the public is but indirectly interested; whether they progress or cease, the public is not directly affected.'

"To apply this reasoning to the cases now in hand. In a market established, managed, and controlled by the municipal authorities, and conveyed by municipal laws, there may be, no doubt, a public use. Such were the markets formerly maintained by the city in Market street and other streets. But what legal interest has the public in the plaintiffs' market houses? Is not their property entirely under their own control? May

Plaintiff a
private corporation running a private business.

they not rent their stalls to whom they please, and refuse them to whom they please? And may they not, by the express words of their charter, rent or sell the whole building when and to whom they please? The second section of their charter declares that they may. Where is any trace of a public trust impressed upon their property? Or where are there any rights of the public which can be enforced against them? May they not be sold out by the sheriff at any time upon a creditors' execution, like any private individual? The answers which must be given to these questions show, it appears to me, conclusively, that the plaintiffs are but private corporations owning property impressed with no public trust; that they are engaged in a purely private business, which is wholly under their own control, in which the community has no public rights, and with which the public has no right to interfere. It is impossible that corporations which exist solely for their own purposes and profit, and which are governed only by their own interests and their own will, and over which the public can by no possibility exercise any control, can be regarded as corporations existing for public uses, within the legal meaning of those words.

"But it is said the plaintiffs have a franchise. Well, if they have, the franchise, as I have already shown, may be taken by virtue of the right of eminent domain, unless it is a franchise existing for public uses. If it is a Plaintiffs' franchise. franchise of that character, it cannot be taken without an express legislative grant, or in virtue of an implied power arising out of an absolute necessity. But what is their franchise? A franchise, in England, is a branch of the king's prerogative subsisting in the hands of a subject. It is derived from the crown, and must arise from the king's grant, or by prescription, which presupposes a royal grant. In this country it may be defined by a privilege vested in certain persons by grant from the sovereign authority in the state to exercise, possess, or to perform acts which, without such grant, they could not do or perform. A franchise is *jus publicum*, and necessarily exclusive in its nature. What are the franchises possessed by the plaintiffs? They have the franchise of being a corporation. As such, they have a right in their corporate capacity to have and maintain a market house. There is plainly nothing exclusive in that. Any person, or association of persons, have a right to do the same thing without any grant from the state. Every green grocer and provision dealer in the city is engaged in the same business; that is, he keeps a market house. Unlike the plaintiffs, however, he not only keeps the market house, but he himself sells the provisions which are sold there. The plaintiffs are engaged in main-

taining a market house in their collective capacity, under the cover of a charter. Any person may do the same thing without a charter. There is nothing in the nature of a franchise in the business which they carry on, for any one who chooses may carry on the same business. Their franchise consists solely in being a corporation, and carrying on their business in a corporate capacity. When the defendant takes their market house under the delegated power of eminent domain, it does not take their charter or touch their franchise of being a corporation, which is really the sum total of the franchises which they possess. Even if the taking of their property involved the loss of their charters, as their counsel argues—a proposition to which I by no means assent—they could obtain a new one, as any other person may, under the provisions of the act of 1874, for the mere asking. 1 *Purd. Dig.* 336. What is the commercial value of a franchise which anyone who chooses to ask for may obtain for nothing?

“On the argument, much was said by the plaintiffs of the importance of public markets, and the case was argued as if the right to maintain a market house or to hold a market in Pennsylvania was a prerogative vested exclusively in the state, and one which no one can exercise without a grant from the commonwealth. At common law, in England, the establishment of public markets was no doubt a part of the king's prerogative and no one could get up a market without a grant from him. Such grants were doubtless at one time fruitful sources of revenue to the royal exchequer. Their establishment was, as Blackstone says, ‘a part of the economies or domestic polity, which, considering the kingdom as a large family and the king as master of it, he had the right to dispose of as he pleased.’ 1 *Bl. Comm.* *274. These English markets, with their stewards, their toll, their courts of piepoudre, in which all disputes originating in them must be decided before the setting of the sun, their special privileges and peculiar customs, constituted an important feature in the domestic economy of every English neighborhood. They were a part of the royal prerogative, undoubtedly, but they never crossed the seas to this country in that capacity, any more than did the right to all royal fish, such as the whale and the sturgeon, the right to corodies, to wrecks, to treasure trove, or to *bona waviata*. Our ancestors, when they transplanted on these shores the principles of English freedom, left behind them all royal prerogatives except such as were to be, in the hands of the people, the necessary instruments of the free government which they here established. I am not aware that it has ever been supposed or maintained in Pennsylvania that no man or as-

Market privilege as a prerogative.

sociation of men could set up a market house or establish a market without a grant from the legislature. The right to be a corporation and to carry on any business in a corporate capacity is a right derived from the commonwealth. The right to maintain a market house or to carry on the business of a market is not a right so derived, but is a right belonging to all citizens of the commonwealth alike, and which any citizen or any association of citizens may exercise without any grant or any warrant whatever from the commonwealth. A private company incorporated for that business is a private corporation, as much so as a private company engaged in the manufacture of goods, in insurance, in the keeping of an hotel, or the prosecution of any other business. These are not the less private corporations because they incidentally afford a convenience to the public. In *Turnpike Co. v. Wallace*, 8 Watts, 316, it was held that a company in which the state held a hundred and seventy-one thousand dollars of the stock, and individuals only sixty-two thousand dollars, was a private, not a public corporation. If the foundation be private, the corporation is private, although the uses in a certain sense may be called public. The mere act of being incorporated cannot change a corporation from a private to a public one. 'To hold a corporation to be public because the charity is public would,' says Chancellor Kent, 'be to confound the popular with the strictly legal sense of terms, and to jar with the whole circuit of decisions since the time of Lord Coke.' 2 Kent. Comm. (13th Ed.) *276. 'Tried by any tests which can properly be applied to them, the plaintiffs are private corporations. They have not a single feature belonging to a public corporation. They maintain the markethouses they own or not, at their option. They can sell them or rent them. Their property may be taken in execution, and sold, like that of any individual. They are not armed with any portion of the right of eminent domain. They owe no duty to the public which they are bound to fulfill, or which can be enforced by the public. The public has no legal rights of any nature in their property, nor any use therein which is recognized by law. They are not under any public authority or subject to any public control, nor have the public any use in their property or any franchise which is secured by any law, or which can be enforced by any remedy. They are not liable to any public supervision, nor can they be made to respond to any public demands. Being therefore, in every legal sense, mere private business corporations, with no public function which they can be compelled to perform, and subject to no public use which can be enforced

Plaintiffs a
private corporation.

against them, there is nothing in their constitution, their nature, or their relations to the state or to the public, which exempts their property from the exercise of the sovereign right of eminent domain. They stand in that respect upon the same level with every citizen in the commonwealth and have no greater rights in this regard than any private individual whose property is needed by the state for public purposes. With regard to the numerous amendments which have been made to the plaintiffs' bill, and to the injunction affidavits, and the other affidavits which have been filed in aid thereof since this cause was argued before us, they appear to us to have been intended to alter the whole character of the present proceeding, and to convert it into a *quo warranto* proceeding against the defendants, or to make it subserve the office of a *scire facias* to repeal the defendant's charter. It is only necessary to say that this cannot be done, either under the act of 1871, or under any other law known to this state, and this has been so often determined that it is quite unnecessary to refer to the cases upon the subject. The charter of incorporation of a regularly incorporated company cannot be called in question or assailed in any merely collateral suit affecting the rights of the corporation. The machinery for that purpose can only be set in motion by the state or its authorized public officers. The motion for an injunction is refused. After a careful consideration of the bonds which have been offered by the Philadelphia & Reading Terminal Company for our approval, we are of opinion that they are entirely sufficient. They are adequate in amount, and the sureties are satisfactory."

F. L. Wayland, Benjamin P. Wilson, and George Junkin, for appellants.

Thomas Hart, Jr., and John G. Johnson, for appellee.

PER CURIAM.—These were appeals from the refusal of the court below to issue a preliminary injunction restraining the Philadelphia & Reading Terminal Railroad Company from proceeding to condemn, under its right of eminent domain, the market house of the respective appellants for depot purposes. The order below was interlocutory, and in appeals from such orders it is not our practice to dispose of cases upon their merits. In these instances, however, the facts are before us as fully as they would be upon final hearing, and, as it is to the manifest interest of the parties to the controversy that their rights shall be settled, an agreement has been filed that we shall enter a final decree. It would be difficult to add anything profitable to the opinion of the learned president of the court below, and we adopt it as the opinion of

this court. The decree is affirmed in each case, and the bill dismissed, at the cost of the appellants.

MANION

v.

LOUISVILLE, ST. LOUIS & TEXAS R. CO.

(*Kentucky Court of Appeals, October 4, 1890.*)

Eminent Domain—Right of Landowner to Compensation—Abandonment by Company of Purpose of Taking Property.—The owner of land condemned by a railroad company has no cause of action against such company for the damages awarded him before the entry of the company on the premises, or before its acceptance in some manner by which the landowner is divested of title or the enjoyment of his estate. Accordingly, a railroad company may, after the county court has entered judgment assessing the damages against it under § 7, chap. 18 *b*, Gen. St. Ky., abandon its purpose of taking the property in question, without incurring any liability beyond the costs of the proceedings.

APPEAL from Henderson Circuit Court.

John Young Brown, for appellant.

Yeaman & Lockett and *Helm & Bruce*, for appellee.

PRYOR, J.—The General Statutes, chap. 18 *b*, § 7, provides: “Upon confirmation of the report of commissioners by the county court, or the assessment of damages by said court as herein provided, and the payment Case stated. or tender to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the county court when the damages are assessed by said court, and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land or material and to use and control the same for the purpose for which it was condemned, as fully as if the title had been conveyed to it.” The Louisville, St. Louis & Texas Railway Company sought to condemn the land of the appellants for the use of the corporation, and having applied to the Henderson county court for the appointment of commissioners to go upon the land to ascertain its value, and the damages that would be sustained by the appellants by reason of the taking and use of the property, subsequently abandoned the condemnation proceedings, and refused to pay the damages assessed against it. The commissioners fixed the value of the property, including the incidental damages sustained, at \$750. The report was filed in the county court, and the appellants summoned to show cause why the report

should not be confirmed, and on the hearing in that court both the appellants and the railway company filed exceptions to the report of the commissioners, and a jury was impaneled, and assessed the entire damage at \$800. A judgment was then awarded in favor of the railway company by which, upon the payment or tender of the money, the title to the land (described) should vest in it for the uses for which it was condemned, and a commissioner was appointed to execute a deed in pursuance of the judgment after the payment or tender of the money. The proceedings under the statute are, first, the appointment of commissioners, upon the application of the company, to assess the damages, their report in writing fixing the amount or sum to be paid, and describing the land condemned; a summons upon the filing of the report against the owner to show cause why the report should not be confirmed, and if no exceptions are filed by either party the report is confirmed; when exceptions are filed (and they seemed to have been filed in this case) a jury is impaneled to try the issues of fact, if any, made by the exceptions. This issue of fact generally arises as to the quantum of damages, and the verdict of the jury is conclusive, subject to the right of appeal to a higher tribunal. After verdict, if not set aside, the county court is required to enter a judgment in the nature of the finding, and to make an order for the conveyance of the title on the payment of the money. From the judgment either party may appeal within 30 days to the circuit court, where the case is tried *de novo*. All this proceeding was gone through with, and a judgment entered, but no appeal prayed by either party, and after the expiration of 30 days—the time for the appeal—the railway company notified the appellants that they would abandon the right to enter. This action was then instituted to recover the damages assessed, the appellants alleging, in substance, the proceedings had with reference to the condemnation, and the failure of the appellee to notify the appellants of its intention not to enter or use the property until after the time had expired for taking the appeal. A demurrer was sustained to the petition, and this appeal prayed:

The question presented in this case is, has the owner of the land condemned a cause of action against the corporation for the damages awarded before its entry on the premises for the use contemplated, or before its acceptance in some manner by which the owner is divested of title or the enjoyment of his estate? It is conceded that the owner may become, and is in fact made, the involuntary vendor of his land under the exercise of this sovereign power, and, while there may be no contract between him and

Question
presented.

the corporation by which it can occupy the land, still there must be some means of enforcing the judgment if a liability exists. The principal inquiry then is, when does the liability of the corporation arise? We think it plain, under the statute, that the right of the owner to compensation does not attach until the entry of the corporation on the condemned land, nor does the corporation acquire any right until the damages are actually paid or tendered to the owner. It is true that a corporation might accept the terms of the assessment in such a way, regardless of the statute, as would authorize a recovery of the damages by the owner, but we are considering now a proceeding under the statute alone, where there has been no payment or tender of the money or entry by the party causing the condemnation. The statute expressly provided that when the corporation or railway company pays the damages, and all cost, or makes a tender to the owner of the amount, the company shall be entitled to enter and use and control the property for the purpose for which it was condemned. The corporation has no interest in the property until this is done, nor is the owner divested of his title in whole or in part until this provision of the statute has been complied with. As said in *Lamb v. Schottler*, 54 Cal. 327: "In a legal sense, the land has not been taken until the act transpires which divests the title, or subjects the land to the servitude." When compensation is made under the statute of this state, the title vests, and not before, and the owner of the land holds it up to that time as if no condemnation had taken place. In such proceedings the right of each party is determined, in most of the states, by statutory regulations, and in England the company is bound to take the land it selects; so in many of the states of this country the confirmation of the report fixing the damages gives to the owner a right to sue for the compensation, and in fact it has been held in one or more cases in the absence of an express statute that, after judgment or a confirmation of the assessment, the corporation may be compelled to pay. *In re Water Com'rs*, etc., 31 N. J. Law, 72. This court held in the case of *Cave v. Calmes*, 3 A. K. Marsh, (Ky.) 36, that an action could not be maintained on a judgment of the county court assessing the damages that would result to the land of Calmes' by the erection of a milldam by Cave; that such a judgment created no contract relation between the parties, and Cave, having proceeded to erect the dam without paying the money, was liable only in an action *ex delicto* for the injury done and not *ex contractu*. The case referred to by counsel in 8 Bush, (Ky.) 98, (*Duncan v. Mayor*, etc., of Louisville,) in which the city was

When owner's
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compelled to take the property condemned, was under a statute regulating the manner in which the city could avoid liability, and that was by dismissing the petition before final judgment, and the city failing to do so this court held it was an election to take the property. In *Garrison v. City of New York*, 21 Wall. (U. S.) 196, where damages had been allowed by the commissioners, and their report confirmed, the legislature authorized an appeal from the order when no such right existed at the date of the confirmation, and, further, gave power to the supreme court in chambers to vacate the order of confirmation, and appoint other commissioners. This was acted upon by the court, and other commissioners appointed to award damages. It was held on the appeal of the property owner that no contract existed by reason of the confirmation of the original commissioner's report as to the damages, and, further, "until the property is actually taken, and compensation is made or provided for, the power of the state over the matter is not ended." In this state compensation must be

When com-
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actually paid or tendered before any right passes to the railway company, and hence there is no reason for requiring it to pay for property with the title and possession in the owner as it existed before condemnation. It is liable for all the cost of the proceeding, but no more. Nor does such a doctrine work any hardship on the owner of the land. He complains, not only of the damage to be measured by the actual value of his land, but says there are incidental damages, such as affect the value of the balance of the tract, and that is allowed also. Now, when the company concludes not to enter and inflict this injury, the owner ought not to insist upon its doing so. The weight of authority undoubtedly is that, in the absence of statutory provision, the effect of provisions for condemnation is simply to fix the price at which the party condemning can take the property, and that even after condemnation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded. *Lewis, Em. Dom.* § 656. Such is the correct rule on the subject, and to adjudge otherwise would require the applicant, whether a private corporation or a state or municipality, to submit to the imposition of exorbitant values upon property condemned for public use, and to often take possession or purchase that which would be detrimental instead of beneficial to the public interests. Whether the power is exercised by the government, or by a corporation to whom that power is delegated, the same rule should apply. The right is given for the reason that the public good demands the use of the property, and the rule applicable to

the state should apply to the corporation. The judgment sustaining the demurrer, and dismissing the petition, is therefore sustained. *Gear v. Dubuque & S. C. R. Co.*, 20 Iowa, 523; *St. Louis & S. E. R. Co. v. Teters*, 68 Ill. 144; *State v. Cincinnati & I. R. Co.*, 17 Ohio St. 103.

Eminent Domain—Right of Railroad Company to Abandon Its Purpose of Taking Property.—See *Cooper v. Anniston & A. R. Co.*, (Ala.) 36 Am. & Eng. R. Cas. 581, note 583; *Chicago v. St. L. & W. R. Co.*, 30 *Id.* 268, note 571; *Cathedral of Holy Trinity v. West Ontario Pac. R. Co.*, 30 *Id.* 422; *Denver & N. O. R. Co. v. Lamborn* (Colo.), 23 *Id.* 115, note 122; *Schreiber v. Chicago & E. R. Co.*, 23 *Id.* 130.

WALLACE *et al.*

v.

NEW CASTLE NORTHERN R. CO.

(138 Pa. St. 168.)

Eminent Domain—Bond to Secure Compensation—Insolvency of Sureties.—Constitution Pa., art. 1, § 10, and art. 16, § 8, provides that private property shall not be taken for public use until compensation shall be paid or secured. Act Pa. April 9, 1856, § 2, provides that railroad companies must secure the landowner's compensation where his property is taken, by giving a bond "with at least two sufficient sureties," "and if the bond and sureties are approved the bond shall be filed" for the benefit of those interested. *Held*, that the word "secure" in the constitution, should be construed to mean that it shall be made reasonably safe and sure that the owner of property taken shall be able to collect the compensation for it; and the words "sufficient sureties" in the statute mean such sureties as at the time they are taken make it reasonably certain that the property owner can collect from them just compensation. The railroad company's right to property condemned is not conditional on the security given by it being adequate for all future time until the compensation be paid. Accordingly, after the company has filed its bonds and secured the landowner's compensation, and such bond has been approved by the court and filed, under the provision of the statute, the landowner cannot maintain a bill in equity to restrain the completion of the road, on the ground that both the company and its sureties on the bond have become insolvent.

APPEAL from Lawrence County Court of Common Pleas.

On August 28, 1886, George Wallace and Nancy I., his wife, filed a bill in equity against the New Castle Northern Railway Company. The franchises and property of the defendant company having subsequently been purchased by the New Castle and Shenango Valley Railroad Company, an amended bill was filed on July 31, 1888, making the last named company also a defendant.

The bill averred, in substance, that the New Castle N. Ry. Co., desiring to enter upon the lands of the said wife for the construction of its road, tendered a bond in the sum of \$5,000,

with D. H. Wallace and W. C. Harbison as sureties, which bond the plaintiffs refused to accept; that on August 1, 1885, the said bond was presented to the Court of Common Pleas, and, against the objections of the plaintiffs, was approved and directed to be filed, etc., whereupon the said company entered upon the plaintiff's land and had partly constructed its railroad; that on January 23, 1884, proceedings for the assessment of damages were instituted which resulted in a report of viewers awarding the sum of \$3,000 for damages from which report the company entered an appeal that was still pending and undetermined; that at the time of the approval of the said bond, both the said company and its sureties in the bond were really insolvent, and shortly after said approval became notoriously insolvent, and still so remained praying:

1. That the court would decree that the approval of said bond was secured by fraud, and that such bond and its approval were totally without effect to give any right to the defendants.

2. For an injunction to restrain the company, its agents, etc., from further entry upon said lands until compensation was paid or secured.

3. For further relief.

The cause, having been put at issue by answers and replications, was referred to Mr. James H. Sword, as master and examiner, who on August 17, 1890, filed a report, finding that the sureties to the bond were not insolvent at the time the bond was approved, but became insolvent about September, 1883, and had since so remained; that there was no sufficient evidence that a fraud was practiced upon the court to obtain an approval of such bond; and that an order of the court discharging a rule to show cause why the bond should not be stricken off, made on February 12, 1885, upon the petition of plaintiffs filed September, 24, 1884, though modified by an order made on September 7, 1888, that it should be without prejudice to any rights of the plaintiffs by bill in equity or any other judicial proceedings, and also without prejudice to any rights of the purchasers of the said railway company acquired since February 12, 1885, was conclusive against the right of the plaintiffs to have relief in the present proceeding. The master, therefore, recommended that the plaintiff's bill be dismissed.

To the said report, the plaintiffs filed exceptions, alleging, *inter alia*, that the master erred:

2. In not finding that all the obligors in the bond were really insolvent at the date of its filing and approval by the court, and in finding the sureties solvent at that time.

4. In finding that the order, discharging the rule to show cause why the bond should not be stricken off, was conclusive against the plaintiffs in the present proceeding.

5. In finding that the defendant, the New Castle & Shenango V. R. Co., was rightfully on plaintiff's land.

McMICHAEL, J., filed the following opinion:

"On September 24, 1884, these plaintiffs presented their petition to court, in which they alleged the same facts, substantially, which are alleged in the original bill in the present case, and praying the court to strike off and cancel the approval of the bond, (the same bond mentioned in the present bill,) and to compel the New Castle Northern Railway Company to give other and better sureties before proceeding further in the construction of its road. Several other petitions of like character were presented by other parties over whose lands the New Castle Northern Railway had been located. After hearing the arguments in all these cases, the court, on February 12, 1885, made an order in each case refusing to grant the prayer of the petition, and in the case of Elizabeth Welsh *v.* New Castle Northern Railway Co., at No. 26 Sept. Term, 1883, filed an opinion giving the reasons for the orders so made. The same question came up again in 1888, in the case of Wm. Bryant *v.* The New Castle Northern Railway Co., at No. 25 Sept. Term, 1883, when the subject was again considered, and the former ruling of the court was adhered to. Now the court is, in effect, asked to reconsider and reverse these former decisions: I do not blame the counsel for their earnest persistence to find some relief for their clients. This railroad is located across quite a number of farms whose owners are in precisely the same condition, respecting their damages, that the plaintiffs are. The former decisions of this court on their rights doubtless appear unjust to these land owners, who as the case stands, cannot collect any damages for the injuries done them by the construction of this railroad. Hence their persistence ought to be excused. There has not been anything presented, however, in the present case, which convinces me that the court erred in its former decisions on this subject. In article 1, § 10, of the constitution it is written, 'Nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made or secured. In article 16, § 8, it is provided that corporations 'shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured

Case stated.

Hardship on property owner.

Constitutional provisions construed.

before such taking, injury or destruction.' These clauses are restrictive in their character. They grant no right to any one to take private property for public use. They prohibit the state from granting the franchise of eminent domain so that it can be used, and they prohibit every corporation from using that franchise, without paying or securing just compensation for property taken, injured, or destroyed. The legislature can grant the right to take private property for public use subject to these restrictions, and it has

**Legislature
may prescribe
security.**

never been doubted that the legislature may prescribe the kind and character of the security to be given, and the manner in which it shall be given.

The power to so prescribe must be lodged somewhere else than in the parties immediately concerned, viz., the corporation and the property owner, because they might never agree. The state has retained this power, and has exercised it, and its right to do so will not, I think, be questioned. Then we have this case: The New Castle Northern Railway Company had the right to take plaintiff's property for its use in constructing its railroad, upon securing to the plaintiff the payment of just compensation for the property taken. The kind and character of the security to be given, and the manner of giving it, were prescribed by law. The company observed and obeyed all the legal requirements respecting the security, and took the property. Did it have the right to take it? It is surely difficult to answer 'No' to that question. It had the right under

**Sureties need
not always be
sufficient.**

certain conditions and restrictions, and it complied with these conditions and restrictions. Then its right was absolute. There is nothing anywhere in this legal machinery which makes the company's right to the property conditional on the security being adequate for all future time or until the compensation shall be in fact paid. The company must give a bond 'with at least two sufficient sureties,' 'and, if the bond and sureties are approved' by the court, 'the bond shall be filed in said court for the benefit of those interested.' Act April 9, 1856, § 2. The sufficiency of the sureties is to be decided by the court, where the parties do not agree respecting them, and, if the court decide them sufficient, that is an end of the question. There is no further condition that they must remain sufficient. If there was such a condition, then the company's right to take property upon giving security would be valueless. It would be no right at all. The only right to take private property for public use then would be to pay the owner the just compensation. Until actual payment, the owner would retain his grasp on the property. The right to take

the property on giving security cannot be reasoned away in such a manner. 'Sufficient sureties,' as used in the act of 1856, does not mean sureties who will not, or cannot, become insolvent. If it did, then no such bond as the act requires could ever be given, because there are no such sureties. The history of the business world proves that they do not exist. The only reasonable, and therefore the true, construction of the word 'secured' in the constitution, is that it shall be made reasonably safe or sure that the owner of the property taken shall be able to collect the compensation for it; and the words 'sufficient sureties,' in the act, must be construed to mean such sureties as at the time they are taken made it reasonably certain that the owner of the property taken can collect from them a just compensation. These views are fully sustained by the supreme court in *Fries v. Southern Pa. R. & Min. Co.*, 85 Pa. St. 73, and *Hoffman's Appeal*, 118 Pa. St. 512. True, the solvency of the sureties was not a question in either of those cases; but, if their insolvency could have defeated the company's right in either case, the supreme court could not have reached the conclusion it did reach. I have thus again considered the vital question in this case. As already stated, it has several times before been decided by this court. What I have now said is but a repetition in another form of what was said in the case of *Elizabeth Welsh v. The New Castle Northern Ry. Co.* The counsel said the reasoning in that case did not appear very satisfactory. Possibly, I have now made the subject more clear. The case might have been disposed of on the point made by the learned master,—that the whole subject matter of the present bill and complaint was adjudicated on the former petition; but I thought it would be better to reconsider the merits of the case. The exceptions to the master's report are not sustained, and plaintiffs' bill is dismissed; the plaintiffs to pay the costs."

Plaintiffs appeal.

Dana & Long and *W. D. Wallace*, for appellants.

J. Norman Martin and *D. B. & L. T. Kurtz*, for appellees.

PER CURIAM.—The appeal presents a question of some interest and importance. It is so well discussed by the learned judge of the court below that we affirm the decree upon his opinion. This decree is affirmed, and the appeal dismissed, at the costs of the appellants.

Eminent Domain—What is Sufficient Security for Compensation—Bonds.—See note 17 4m. & Eng. R. Cas. 26, 27. In a recent Massachusetts case, *Old Colony R. Co. v. Framingham Water Co.*, 27 N. E. Rep. 612, it was held that a statute providing that the owner of land taken thereunder by a water company might, upon application of either party, require the com-

pany to give security to the selectmen of the town for the payment of all damages that may be awarded to them; and if, upon petition of the owner, the security appears to the selectmen to have become insufficient, they shall require the giving of further security. *Held*, that the provision for compensation is sufficient. The court said: "The provision for compensation for the land taken is sufficient. It is precisely the same as that contained in Pub. St. chap. 112, § 97, in reference to land taken for a railroad, except that the selectmen of the town are made the tribunal to determine the sufficiency of the security, instead of the county commissioners. Under the constitutions of several of the states, and probably under the decisions of the courts in some others, this provision for compensation would not be held sufficient and a statute of this kind would be unconstitutional; but in this commonwealth the law is settled differently. *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394; *Woodbury v. Marblehead Water Co.*, 145 Mass. 509; *Bigelow v. Union Freight R. Co.*, 137 Mass. 478, 20 Am. & Eng. R. Cas. 425. See also, *Cushman v. Smith*, 34 Me. 247; *Pittsburg v. Scott*, 1 Pa. St. 306; *Robottom v. McClure*, 4 Blackf. (Ind.) 505."

GEORGIA SOUTHERN & FLORIDA R. CO.

v.

SMALL *et al.*

(*Georgia Supreme Court, July 8, 1891.*)

Eminent Domain—Time as to which Damages should be Assessed—**Appeal**.—There being no tender made by the company on the basis of the first verdict or award in the condemnation proceedings, there was no taking by the company for public use on that basis, and it was not error on the trial of an appeal to admit evidence of the value of the property at the time of the appeal trial, and to instruct the jury to assess compensation accordingly.

ERROR from Superior Court, Bibb County.

Gustin, Guerry & Hall and *Dessan & Bartlett*, for plaintiff in error.

R. W. Paterson and *Robt. Hodges*, for defendants in error.

SIMMONS, J.—This bill of exceptions recites "that, during the April term of the superior court of Bibb county, there came on to be heard a certain cause, wherein A.

Case stated. B. Small, trustee, was complainant, and the Georgia Southern & Florida Railroad Company was defendant, the same being an action to enjoin the said railroad company from the further prosecution of condemnation proceedings to condemn certain lands in the city of Macon belonging to said complainant, which condemnation proceedings had been instituted under the charter of said railroad company; and also the case of the Georgia Southern & Florida Railroad Company v. A. B. Small, trustee, said last-mentioned case being a statutory proceeding to condemn the property of said Small,

trustee, for the use of said railroad company, and then and there pending upon appeal from the verdict of the jury in said condemnation proceedings; both of which cases were by the order of the court consolidated and tried together; and, both parties having announced ready in both cases, a jury was impaneled to try the same." The bill of exceptions then goes on to recite that, pending the trial, the court allowed certain witnesses to testify as to the value of the property at the time of the trial. This was objected to upon the ground that the testimony sought to be elicited was illegal, for the reason that the value of the property to be submitted to the jury was the value at the time of the condemnation proceedings in July of the preceding year, and not its value at the time of the pending trial, (May, 1890;) which objection was overruled by the court, and the witnesses allowed to answer the questions. The company excepted, and assigned error thereon. The judge charged the jury as follows: "The sole issue for the jury on this branch of the case, is to determine the present value of the property, located as it is in the city of Macon, at the present time, and for that purpose may be used all the testimony that throws any light upon that question of the present value of the property." To this charge the company also excepted, and assigned the same as error. The constitution of the state declares (Code, § 5024) that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." It appears from the above recital of facts set out in the bill of exceptions that the railroad company had, under its charter, in July, 1888, instituted condemnation proceedings for the purpose of taking this land from Small for its use. A jury had been summoned by the sheriff in accordance with the provisions of the charter, and they had assessed the value of the land. Small, being dissatisfied with the verdict, appealed to the superior court, and at the same time filed a bill seeking to enjoin the railroad company from condemning the land. The only question made by this record is whether, on the trial of the appeal in the superior court, the value to be assessed by the jury should be the value of the land at the time of the condemnation proceedings in July, 1888, or its value at the time of the trial of the appeal, May, 1890. This question depends upon what time the taking is complete, so as to authorize the railroad company to take possession of the land. Under the clause of the constitution above quoted, the landowner must first be paid, before the railroad company is entitled to take his property and go into possession of it. If both parties are satisfied with the award of the jury summoned to assess the value of

When property is considered as taken.

the property, the railroad company must pay the amount assessed before it can take possession. If the owner is dissatisfied, and appeals to the superior court, and the railroad desires immediate possession, it must tender the amount assessed by the jury before it can go into possession. In the case of *Oliver v. Union Point & W. P. R. Co.*, 83 Ga. 257, 39 Am. & Eng. R. Cas. 107, this court held that the tender of the sum assessed and awarded, duly made and continued, but refused, is the equivalent of actual payment of the award, in its effects on the right of the corporation to enter upon the land and prosecute the work of construction. If this company had tendered to Small the amount assessed by the jury in the condemnation proceeding, it might have had the right at the time to take possession of the property, and a tender, properly made and continued, would have been equivalent to an actual payment. It is not necessary, however, to decide definitely this particular question. We have carefully scrutinized this record, and there is no indication or intimation therein that any tender of the amount assessed was made by the company to Small. There was consequently no taking by the company for public use, and it was no error on the trial of the appeal to admit evidence of the value of the property at the time of the trial; nor was there any error in the charge of the court above recited. If a tender had been made and continued, then the value of the property at the time it was assessed in the condemnation proceeding might have been the proper basis for estimating its value at the appeal trial; but, inasmuch as the record does not show that tender was made, there was no taking, and no right of possession, and the value at the time of that trial was the proper basis. Judgment affirmed.

Time as to
which dam-
ages should
be assessed.

Eminent Domain—Time as to which Damages should be Assessed.—See *post*, *Chicago, M. & St. P. R. Co. v. Randolph Town Site Co.*, and note.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

v.

RANDOLPH TOWN-SITE CO.

(103 *Missouri*, 145.)

Eminent Domain—Damages—Time at which Value of Land is Reckoned—Wrongful Entry.—Where private property is taken for public use, the compensation must be based on the value of the land at the date of the taking or appropriation; and this means, at the time the property is taken or appropriated by proper legal proceedings, and not at the time of some previous wrongful entry, although made with the knowledge, and without the active opposition of the owner of the land.

Failure of Court to Instruct Commissioners.—The failure of the court, in condemnation proceedings, to instruct the commissioners as to their duties, neither party having requested that instructions be given, is not ground for setting aside the award of such commissioners.

Report of Commissioners—Sufficiency of Description of Land.—Commissioners to assess damages in condemnation proceedings described the land through which the railroad ran as, "a strip 100 feet wide extending from the east side to the west side, through the centre of which strip the railroad is now surveyed and located, so as to leave one half of the width on each side of said center line." *Held*, that the land was sufficiently identified.

Jurisdiction of Court—Efforts of Parties to Agree.—A railroad company in condemnation proceedings, cannot object that the court acquired no jurisdiction, because no efforts have been made to agree by the parties, where the company's petition avers that such efforts were made, and no issue was tendered by the defendant on that question.

Right to Jury Trial—Waiver.—Either party in condemnation proceedings has a right to demand trial by jury; but without such a demand, a jury trial will be waived.

APPEAL from Clay Circuit Court.

E. J. Broadus and Prosser Ray, for appellant.

Peak, Yeager & Ball, for respondent.

MACFARLANE, J.—This is a proceeding for the condemnation of the right of way for plaintiff's railway through the S. E. $\frac{1}{4}$, section 9, and a part of N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$, section 10, township 50, range 32 in Clay county, which be- Case stated.
longed to defendant at the time the proceedings were instituted. The petition was filed on the 6th day of August, 1887. The petition, after stating the incorporation of plaintiff and defendant, that plaintiff was engaged in the construction of a railroad from Ottumwa, Iowa, to Kansas City, in a south-westerly direction through Clay county, and desired to procure the right of way therefor, that the road as located passed through the land of the defendant, describing the land, made the following averments: "That your petitioner desires to construct its road over the lands hereinabove described, of the defendant named herein, and for that purpose your petitioner desires to obtain the right of way, consisting of a strip, belt, or piece of land 100 feet in width extending over and across said lands, through the centre of which said strip, belt, or piece of land, the centre line of the railroad of your petitioner is now surveyed, located, and staked out, so as to leave one-half in width on each side of said center line. That your petitioner has not been able to acquire title to the land or right of way, for the reason that it and the defendant, the Randolph Town-Site Company, cannot agree upon the proper compensation to be paid. Your petitioner herewith annexes to this petition a plat or map showing the route of its proposed railroad over and across the lands herein described,

and the strip, belt, or piece of land which it desires to take for its right of way, which is made a part of this petition. Wherefore your petitioner prays the appointment of three disinterested freeholders, as commissioners, to assess the damages which such owner may sustain in consequence of the appropriation of said strip, belt, or piece of land, and the establishment, erection, maintenance, and operation of said railroad over and upon the same, and to return a plat of the land condemned for the right of way for said railroad, and to file said plat and report in the office of the clerk of said court. And your petitioner further prays, if no valid objection be made to said report, that the court enter judgment in favor of said owner against the petitioner for the amount of the damages assessed, and make an order vesting in your petitioner the title to the lands described in such plat or report." An order was made appointing commissioners on the 19th day of August, 1887. On the 25th day of August, 1887, the commissioners filed their report, which was under oath. This report recited their appointment as commissioners, gave a description of the land affected, and a description of the land to be appropriated, as follows: "A strip, belt, or piece of land, one hundred feet in width, extending from the east side to the west side, over and across said land, through the center of which said strip, belt, or piece of land the center line of the railroad of the Chicago, Milwaukee & St. Paul Railway is now surveyed and located, so as to have one-half in width on each side of the center line." The report further recited the amount of damages assessed, that they took into consideration the value of the land, and the advantages and disadvantages of the railroad to the same, and filed a plat showing the location of the road over the land, making the plat a part of the report. Within 10 days after the report was filed, plaintiff filed exceptions thereto, setting forth the usual objections, and in addition thereto the following: "(5) Because the commissioners erred in estimating the damages to the land from a pretended valuation of the same on the 25th day of August, 1887, instead of its real and marketable value, on the 25th day of August, 1886, at the time the same was taken by petitioner by consent of defendants, and its agents, and with the consent of the owners." On the 27th day of February, 1888, plaintiff filed an amended petition, having, in addition to the averments in the original, substantially the following: That it located and built its roadbed over the land in September, 1886, with the consent of one E. L. Martin, one of the owners thereof, acting with authority from the other owners, without requiring prepayment of compensation; that such consent was given pending certain

negotiations for locating a depot on said land; that in July 1887, said Martin and others formed the defendant corporation, and the title in said land then became vested in it; that it was not able to agree with defendant on the amount of compensation, and that since September, 1886, the land had greatly increased in value, but plaintiff should only be required to pay damages according to the value of the land as it was in September, 1886. On the same day defendant filed a motion to strike out the amended petition, giving as grounds therefor that the same was not authorized, and was filed out of time, which motion was sustained. The exceptions to the report was heard by the court on the 2d day of July, 1888. The evidence on the trial tended to prove that plaintiff commenced grading on this land in September, 1886, that it was completed that fall; that the land was then worth \$150 per acre; that when the proceedings to condemn were commenced it was valued at from \$2,000 to \$2,500 per acre; and that defendant was allowed \$2,000 per acre for the land taken. There were proved unsuccessful negotiations, in February, 1887, between the plaintiff and some of the owners, about the location of a depot on the land, and about filling some ravine with the waste dirt. The evidence did not show that actual permission was given plaintiff to grade the road over the land, but no objection was made thereto. After the evidence had been heard, the court gave a declaration of law that, "under the petition, the commissioners properly assessed the damages from the standpoint of the value of the land at the time they made their assessment, and not from the standpoint of the value at the time the company entered upon the land and constructed their road." The exceptions were overruled, and judgment rendered condemning the land for right of way and for the damages assessed by the jury. Plaintiff filed its motion for a new trial, which being overruled, it appealed to this court.

1. A number of errors have been assigned as grounds for a reversal of the judgment of the circuit court. The most important and most difficult of these grow out of the rulings of the court upon the question as to the proper date at which the assessment of the damages should have been made. The commissioner, in determining the compensation to which defendant was entitled, estimated the value of the land taken, as of the date of the proceedings to condemn. Appellant insists that the court erred in this, and that the value of the land should have been taken, as it was at the date appellant entered thereon, and commenced grading the road. The roadbed was completed over defendant's land in the fall of 1886, at

Date at
which dam-
ages should be
assessed.

which time the land was valued at \$150 per acre. The proceedings to condemn were commenced in August, 1887, at which time the value of the land had fabulously increased to an estimated value of from \$2,000 to \$2,500 per acre. To determine the correct rule for estimating damages in such cases is a question of great practical importance to the parties in interest, and one not without difficulty in a theoretical point of view. Counsel insists that the value of the land should have been estimated, as it was at the date of the appropriation to its own use by the railroad company, and not at the date of its condemnation. The proposition is correct, if there is, in this case, a distinction between the dates of the appropriation and condemnation of the land. The rule, when not controlled or modified by statutory provisions, undoubtedly is that the damages resulting to the land-owner from the exercise of the right of eminent domain by a railroad corporation, in taking and appropriating his land, should be estimated as of the date of the taking or appropriation. This rule is analogous to the one recognized in estimating damages for conversion of personal property, and is generally, if not universally, accepted. *Mills*, Em. Dom. § 175; *Pierce*, R. R. 209; and authorities cited by them. While there has been but little, if any, disagreement on this general rule, the question that has given rise to all the difficulty in the decided cases is to determine the date at which the taking or appropriation takes place. This is the difficulty in the case at bar. Appellant urges the proposition that the taking was complete when entry was made on the land and grading was commenced. The question, as to when the appropriation becomes complete in the decided cases, has depended largely upon the particular grant of the right, or of the power to exercise the right, of eminent domain, in the different jurisdictions, and upon the conditions upon which its exercise depends. The right of one to appropriate to his own use the property of another, without his consent, is a most extraordinary power, is contrary to all principles of natural rights, and cannot be exercised except from public necessity and for public uses. That all the proceedings and conditions prescribed by law for its exercise must be strictly construed and followed is the general rule applied in the construction of laws delegating such extraordinary rights and powers to corporations. "There is no rule more familiar or better settled than this: that the grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the state itself, and in-

terfering most seriously, and often vexatiously, with the ordinary rights of property." Cooley, Const. Lim. 656, and authorities cited. The same distinguished jurist says, (on page 657 :) "So high a prerogative as that of divesting one's estate against his will should only be exercised when the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection." See, also, *City of St. Louis v. Gleason*, 93 Mo. 34; *Anderson v. Pemberton*, 89 Mo. 64.

The application of these principles will aid us in ascertaining, under the constitution and statutes of this state, when, in the exercise of eminent domain by a railroad company, the appropriation of the land takes place. Neither the constitution nor laws, in express terms, designate any specific act or proceedings which conclude, and make complete and perfect, the appropriation, as is the case under the laws of some states, as Indiana and Massachusetts. The constitution and statutes of this state do, in most express and emphatic terms, prescribe conditions that precede such appropriation, and must be complied with before the taking can be complete. The payment of compensation is made a positive and unconditional condition that must precede the appropriation. Section 21 of the bill of rights provides "that private property shall not be taken or damaged for public use without just compensation. The compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be distributed, or the proprietary rights of the owner therein divested." It would be difficult to express, in plainer terms, what must be done before the taking is complete. The statute provides that, after the commissioners have made their assessment and filed their report, which is to be done forthwith, the company shall pay to the clerk of the court the amount thus assessed; and on making such payment it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid. Rev. St. 1879, § 894. The statute must be construed in the light of the constitution, and consistently with it. The words "so appropriated," as used in the statute, cannot be held to imply that the appropriation had taken place at some preceding step in the proceeding, but must be referred to all the proceedings, crowned by the payment of the compensation,—the last and essential act in the condemnation. Thus it will be seen that the constitution and statute laws of the state, the authority delegating to railroad cor-

Same—When
"appropriation" takes
place.

porations the right of eminent domain, a part of the sovereignty of the state, point out with great particularity what must be done before the rights of the owner in his property shall be divested. The requirement that compensation shall be first paid is impressed upon the right to appropriate, and is an imperative prerequisite thereto. The damages assessed shall be paid to the owner, or into court for his use, and until that is done the company has acquired no right to the land, and the proprietary rights of the owner therein are not divested or affected. The condemnation proceedings, in this state, and under its laws, must necessarily precede the appropriation, at least to the act of paying the compensation. When counsel for appellant contends that the damages should be assessed as of the date of the appropriation, and not of the date of the condemnation, he must refer the appropriation to some act other than one exercised under the right of eminent domain. He must refer the appropriation to the physical taking possession of the land, and the condemnation proceedings intended to legalize the previous physical taking. It has been seen that there can be no appropriation without condemnation, and that the latter must precede the former. Appellant is certainly wrong, then, at least in the use of terms. The land could not have been "taken" or "appropriated" in the fall of 1886, because these terms imply an absence of consent on the part of the owner, and in such case, as has been seen, compensation must be paid before the taking is complete. Without being technical as to the use of terms, we see that plaintiff's contention is that the facts in this case authorize and demand a departure from the general rule, requiring the value of the land as it was when the damages were assessed to be taken, and that the value should be taken as at the date of the entry by plaintiff. There is no doubt that the right of prepayment of damages may be waived by the land-owner, and a license, express or implied granted by him to the company to enter on the land, and construct the road; but the right so waived by the owner, and that so acquired by the company, unless sufficient to constitute a contract, is not such a compliance with the constitution, or such waiver of rights thereunder, as will constitute an appropriation under its conditions. It is not sufficient to constitute a taking that the company get a foothold upon the land, either as a trespasser or licensee. A mere physical taking is not what was contemplated by the constitution. The taking must be under judicial sanction, and after payment of compensation, as pointed out and required by law. "A railroad corporation has no right to take the land of any person, for the construction of its road, except under and in

strict compliance with the provisions of the statute giving the authority and prescribing the course of proceeding." *Hampden Paint, etc., Co., v. Springfield, etc., R. Co.*, 124 Mass. 118. "The universal rule laid down by the books is that, where property is taken for public uses by the exercise of the right of eminent domain, the compensation must be fixed at the date of taking the property; that is, the time the public make the appropriation. That this means the time of taking and appropriating the property by appropriate legal proceedings, and not the time of some previous wrongful and tortious entry, necessarily follows from the constitutional provision which requires compensation first made. Until that time the property still belongs to the original owner. The fact that a railroad company has, in advance of proper condemnation proceedings, committed a trespass, and wrongfully taken possession of land, gives it no right to insist that such proceedings, subsequently instituted, shall relate back to the date of the trespass." *Blue Earth Co. v. St. Paul & S. C. R. Co.*, 28 Minn. 503, 10 Am. & Eng. R. Cas. 209. See, also, *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300; *Dearborn v. Boston, C. & M. R. Co.*, 24 N. H. 179; *South Park v. Dunlevy*, 91 Ill. 49; *Missouri Pac. R. Co. v. Hays*, 15 Neb. 224, 14 Am. & Eng. R. Cas. 177; *St. Joseph & D. C. R. v. Orr*, 8 Kan. 419; *Driver v. Western Union R. Co.*, 32 Wis. 569; *Cooley, Const. Lim.* 694; *California S. R. Co. v. Colton Land & Water Co.*, (Cal.), 14 Am. & Eng. R. Cas. 194. In the case of *Cook v. South Park*, 61 Ill. 121, the court, in considering the application of the word "taken," as used in the constitution of Illinois, which is similar to that of this state, uses this language: "The taking of the land, the appropriation of it, prior to the performance of the prerequisite of the statute, would be utterly inconsistent with the obvious meaning of the words of the law. If the land cannot be entered upon or used before payment of compensation, it cannot, with any propriety of language, or with reference to the common signification of the term, be said to be taken before payment." It is very clear from the terms of the constitution, from reason and authority, that no appropriation of the land or permanent right to its use could be effected, except either by condemnation, or contract, unless a simple license or permission to enter would be sufficient to give that right.

Upon hearing exceptions to the report of the commissioners, plaintiff was permitted, very properly, to show all the facts and circumstances under which the entry on the land was made. There is nothing in the evidence tending, in the remotest degree, to prove that plaintiff entered upon the land in the fall of 1886, under any agreement with the owners that

the right to the easement should vest at that date, or that the payment of compensation should be postponed to a subsequent day. There was no agreement of any kind shown. Then plaintiff acquired no right to the land in 1886 under any contract. The evidence did not show that the owners of the land were given permission to enter thereon. One of plaintiff's witnesses testified that one Parker gave permission to plaintiff to proceed with the work on the land, but it was not shown that he was interested in the land, or that he had authority from those interested to give their consent. It was sufficiently shown that the owners knew of the entry, and made no active opposition thereto. All plaintiff then has upon which to base its claim of right in the fall of 1886 was the physical entry on the land without opposition or expressed objection from the owners. What right did defendant waive? It is true that defendant could have enjoined the entry, or prevented it by physical force; but was it necessary to do this in order to preserve its proprietary rights in his property, or its right to compensation? It seems to me the only right waived was the right to prevent, by legal or physical means, the entry on its land before payment of damages. We think all the authorities cited by appellant bear out this idea, and go no further. *Provolt v. Chicago, R. I. & P. R. Co.*, 57 Mo. 259; *Ring v. Mississippi Riv. Bridge Co.*, *Id.* 497; *Mueller v. St. Louis & I. M. R. Co.*, 31 Mo. 262; *Soulard v. City of St. Louis*, 36 Mo. 552; *Baker v. Chicago, R. I. & P. R. Co.*, 57 Mo. 274; *Allen v. Wabash, St. L. & P. R. Co.*, 84 Mo. 657. After the public has acquired rights in a road, already constructed and in operation, a different question would arise as to the extent and effect of the waiver of the landowner. Often the corporation secures advantages incidentally, by invoking the rights of the public, as was done in some of the cases cited. None of the well considered cases of any court hold that the mere entry on land, and the construction of the road, under an implied license of the owner, would estop the owner from thereafter asserting all the rights and remedies guarantied him by the constitution. A different rule would be wholly inconsistent with principles of right and justice. The corporation could abandon its location even after damages were assessed. Rev. St. 1879, § 894. There would not exist that mutuality which would give the landowner a right to damages regardless of the right of future abandonment by the company. The statute only gives to the corporation the right to initiate the proceedings to condemn. If circumstances are such as to make a postponement necessary or desirable, and the land owner con-

Failure of
land owner to
object to en-
try.

sents to a previous entry, there can be no injustice in fixing the compensation at the date of the actual appropriation, the date contemplated by the constitution as the time for making compensation. Such silence and inaction on the part of defendant, as is shown in this case, may estop it to claim the improvements put upon the land, or possibly to reclaim the land itself in lieu of damages; but there could be no estoppel to claim its proprietary rights to the land, and its constitutional rights to compensation therefor before they could be divested. The land was not taken, within the meaning of the constitution, until the money was paid into court, and the compensation was properly estimated upon the value of the land at the time the assessment was made by the commissioners. The question does not arise, in this case, whether plaintiff could deny a taking at any time between its entry and the assessment, and is not considered or determined. The court committed no error, then, in the declaration of law given, fixing the time of assessing damages as the time at which the value of the land should be reckoned; and plaintiff was not injured by the action of the court in striking out its amended petition in view of our conclusions as to the proper date for fixing the amount of compensation.

2. It would have been proper for the court to have instructed the commissioners as to their duty in assessing the damages, and as to the proper rules by which they should have been governed in making their estimate. The abstracts of record furnished by appellant fails to show that any instructions were asked. Doubtless they would have been given had either party made a request for them. The court, in civil cases, is not required to give instructions, whether asked or not, as is the rule in criminal cases. It was not shown upon hearing the exceptions that the commissioners committed any error in making their estimates; on the contrary, it appeared that only the value of the land actually taken was allowed as damages, and that at the lowest estimate placed upon it.

Instructions
to jury.

3. It is objected that the report of the commissioners contains no description of the premises condemned. The description describes the tract of land through which the road runs, and gives the following description of the part appropriated: "A strip, belt, or piece of land one hundred feet in width, extending from the east side to the west side, over and across said land, through the center of said strip, belt, or piece of land the center line of the railroad of the Chicago, Milwaukee & St. Paul Railway as now surveyed and located, so as to leave one-half in width on each side of said center line." The report also shows that a

Description
of premises.

plat of the road, showing its location through the land, was filed with the petition. The evidence shows that the road had been built across the land before the report was made. This description is much more specific than the one approved by this court in the case of *Kansas City, C. & S. R. Co. v. Story*, 96 Mo. 620, 36 Am. & Eng. R. Cas. 584. The road itself is a sufficiently designated monument to make the description sufficiently specific. *Cory v. Chicago, B. & K. C. R. Co.*, 100 Mo. 288, 44 Am. & Eng. R. Cas. 183.

4. The next objection is that the court acquired "no jurisdiction, for the reason that no efforts at agreement were made by the parties before the condemnation proceedings were commenced." The petition states that such efforts were made, and no issue was tendered on the question by defendant. It must be taken that the allegation of the petition was true. It was not necessary that this averment should be sustained by oral evidence. *Cory v. Chicago, B. & K. C. R. Co.*, 100 Mo. 288, 44 Am. & Eng. R. Cas. 183.

5. The only remaining complaint of appellant that need be noticed is that he should have been awarded a jury trial to determine the compensation to which defendant was entitled. The constitution certainly provides that the right of trial by jury shall be held inviolate in this class of cases. If either party had demanded a jury trial, it would have been error for the court to have denied the right. The constitution, in order to insure a speedy assessment of damages, and thus avoid delays in public enterprises, provides that such damages may be assessed, in the first instance, by a board of commissioners. The assessment made by this board is final, unless questioned by one party or the other. Either party has the right to question the report by exceptions, or a demand for a jury, or both. A demand for a jury, by force of the constitution, avoids the report of the commissioners, and secures a trial by jury. Without such demand the jury trial will be waived. There is no doubt the constitutional right of trial by jury may be waived. *Kansas City, C. & S. R. Co. v. Story*, 96 Mo. 619, 36 Am. & Eng. R. Cas. 584; *Merrill v. St. Louis*, 83 Mo. 244; *Jones v. St. Joseph, F. & M. Ins. Co.*, 55 Mo. 342. No errors appearing in the proceedings of the circuit court, the judgment is affirmed. All the judges of this division concur.

Eminent Domain—Time as to which Damages are to be Computed—Rule where There has been Wrongful Entry.—There is considerable conflict among the cases as to the time at which damages are to be computed where property has been taken in the exercise of the right of eminent domain. See title "Eminent Domain," 6 Am. & Eng. Ency. Law, p. 564; See also Cali-

fornia So. R. Co. v. Colton L. & A. Co. (Cal.), 14 Am. & Eng. R. Cas. 194; Missouri Pac. R. Co. v. Hays (Neb.), 14 *Id.* 177; Jones v. N. O. & S. R. Co. (Ala.), 14 *Id.* 217; *In re* Union Depot S. R. & T. Co., 14 *Id.* 233; West v. Milwaukee, L. S. & W. R. Co., 10 *Id.* 415. But where there has been a wrongful entry the rule is undoubtedly as it is laid down in the principal case, and the compensation is to be estimated as of the time of the award of the commissioners or the time of the trial as distinguished from the time of such wrongful entry. Blue Earth Co. v. St. Paul & S. C. R. Co., 28 Minn. 503, 10 Am. & Eng. R. Cas. 209.

In Texas Western R. Co. v. Cave, (Tex., March 6, 1891,) 15 S. W. Rep. 786, the same rule was followed and it was held that the value of the land taken, and the injury to the land not taken, are to be assessed as of the date of the condemnation, and not as of the time of original wrongful entry by the railroad company. The court said: "The damages awarded by the judgment are all prospective in character, the price for which the future burden is placed on the land; and a holding that a past unlawful occupancy, which gave no right to continue to occupy, would cut off the right of a landowner to damages based on every element entering into the measure of compensation for taking of land for a public use, could find no justification in principle or authority. Such a holding could stand only on the theory that the wrongful possessor, who thereby has acquired no property in the thing possessed, should for his wrong doing be placed in a more favorable position when he seeks to recover the right to possess than would the person who seeks lawfully to acquire the right to possess and use before he takes possession. The law offers no such rewards for wrong doing. For any injury done to plaintiff's land or use of it, occurring more than two years before this action was brought, he was doubtless barred. The court found that the tract of land through which the railway runs was worth, when the road was first constructed over it, from \$50 to \$100 per acre, but that at the time of trial it would be worth \$1,000 per acre if the railway was not on it or to continue on it, and it is urged that 'the judgment of the court is contrary to law and evidence, in this: That it finds for the plaintiff, E. W. Cave, against the defendant, the Texas Western Railway Company, and, in estimating the damages, takes as the basis of such estimate the value of the land at the time of the trial, and not at the time when the road was built on the property, and the cause of action accrued, and the strip of land taken and appropriated by the defendant company.' At the time the railway was constructed on plaintiff's land the law furnished a method whereby the railway company might have had condemned for its use so much of the land as was necessary, and had it done so plaintiff's damages would have been assessed with reference to the value of the land at that time, but this it did not and now seeks to do when the land has become more valuable than it formerly was, and the price it must now pay is the sum which the value of the land at time of condemnation makes necessary to compensate the owner for the taking. The wrongful possession was not a 'taking,' within the meaning of the laws which prohibit the appropriation of private property to a public use without due compensation to its owner. If the railway company desired to condemn land worth only \$50 or \$100 per acre, it should have caused condemnation to be made when that was its value; and, not having done so, it has no just cause to complain that the law gives to the landowner damages based on the value of the land when it did have condemnation made. The unauthorized construction of the railway on plaintiff's land gave defendant no right in or to the property, and its value at the time such possession began cannot affect the question of damages, which must be measured by the value of the land at the time of condemnation and consequent injury to the owner by the taking; for, although increased in value while defendant was wrongfully

in possession, the land was still the property of plaintiff, and it cannot be appropriated to the public use without adequate compensation first made, unless this be done with his consent. If defendant is now compelled to pay more for right of way than it would have been compelled to pay had condemnation been made at an earlier day, this results from its own failure to take such steps at an earlier period at it might and ought to have taken before taking possession of the land."

In *San Antonio & A. P. R. Co. v. Ruby*, (Tex. March 10, 1891,) 15 S. W. Rep. 1040, the same position was taken. Referring to the rule laid down in the *Cave* case, *supra*, the court said: "We hold this to be the correct rule, under the constitution of this state, which provides that 'no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made or secured by a deposit of money.' Const. art. 1, § 17. The rule is believed to be universal that compensation must be estimated by facts existing at the time the land is taken, though there is some diversity of opinion as to whether this occurs when the proceedings to condemn are instituted or at time of trial. The latter view we think correct in its practical application, though strictly there can be no 'taking,' within the meaning of the law, until the party seeking to condemn has been adjudged to be entitled, and has paid or secured the compensation fixed. *Railway Co. v. Lyons*, 2 Civil Cas. Ct. App. 133; *St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 422; *Winona & St. P. R. Co. v. Denman*, 10 Minn. 267, (Gil. 208); *Metler v. Easton & A. R. Co.*, 37 N. J. Law, 224; *Driver v. Western Union R. Co.*, 32 Wis. 578; *Arnold v. Covington & C. Bridge Co.*, 1 Duv. (Ky.), 372; *County of Blue Earth v. St. Paul & S. C. R. Co.*, 28 Minn. 509, 10 Am. & Eng. R. Cas. 209; *Morin v. St. Paul, M. & M. R. Co.*, 30 Minn. 100, 10 Am. & Eng. R. Cas. 223; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538. Authorities bearing on this question will be found cited in these cases, and in *Lewis, Em. Dom. § 477*."

In *Newgass v. St. Louis, A. & T. R. Co.*, 15 S. W. Rep. 188, the supreme court of Arkansas take the same position. It is there held that on the condemnation of land taken by a railroad company for its right of way, the damages are to be assessed as of the time of the filing of the petition, and not the time of the original entry, nor of the award. There being evidence that the land had advanced in value between the entry and the filing of the petition, error in assessing the damages as of the earlier date was prejudicial to the landowner. The court said: "It is insisted that compensation should have been assessed with reference to the value of the land taken as of the time of filing the petition, and not as of the time of the entry upon the land by the corporation. Upon this question the courts in different states have established different rules. It is held by some that the assessment should be made with reference to the time of entry; by others with reference to the time of filing the petition; and by still others with reference to the time of the award. *Lewis, Em. Dom. § 477*, and cases cited. The court below adopted the first rule, against the objection of the appellant, who contended for the second one. We recall no case in which the question has been presented for the decision of this court; but there are references by the court to it, and in so far as they indicate an opinion it is favorable to the contention of appellant. Either rule is liable to operate harshly in special cases,—as well against the landowner as the corporation; but we see nothing in the one contended for which indicates that it would more often work harshly than either of the others, and it has the advantage of fixing a certain and definite time with reference to which the estimate must be made. Besides, the corporation has the right to acquire the land. When it files its petition it declares its purpose to appropriate

it, and to render just compensation to the owner. Until it has done that it is in default, but afterwards it can do nothing more until, in the regular course of procedure of the courts, a legal ascertainment of the amount to be paid is made. As the filing of the petition is the attempt to assert the right of condemnation, and subsequent delay is without default of either party, it seems fair to each alike that the assessment should be made with reference to value as of that date. *Lewis, Em. Dom. § 477*, and cases cited; *Burt v. Merchants' Ins. Co.*, 115 Mass. 1; *South Park Com'rs. v. Dunlevy*, 91 Ill. 49. There was evidence tending to prove that the land had advanced in value between the time of entry and that of filing the petition, and we cannot hold that the error of the court in making its assessment with reference to the earlier date did not prejudice the appellant. For this error the judgment must be reversed, and as the other points raised will be presented in the future trial of the cause it is proper that we determine them."

In *Twin Lakes Hydraulic G. M. Syndicate v. Colorado Midland R. Co.*, (Colorado, June 5, 1891,) 27 Pac. Rep. 258, it was held that an instruction that the value of land and damages to the residue was to be assessed in accordance with the situation of the property and the conditions existing at the date the petition for condemnation is filed is reversible error, since it is provided by statute (*Colo. Code Civ. Proc. § 253*) that the value of property taken in condemnation proceedings is the actual value thereof at the time of the appraisalment.

In a proceeding to assess compensation for injuries caused by the location and construction of a railroad, the question whether one date or another is the proper one, as of which the witnesses should estimate the market value, is immaterial when it is undisputed that there was no change in the occupation, use, or value of the property between the two dates. *Rees v. Schuylkill River, E. S. R. Co.*, 135 Pa. St. 629.

CHICAGO, SANTA FE & CALIFORNIA R. Co.

v.

MCGREW.

(*Missouri Supreme Court, Division No. 2, March 17, 1891.*)

Eminent Domain—Right of Way Across Mining Land—Interruption of Business—Elements of Damages.—The plaintiff railroad company condemned a right of way across certain coal lands owned by the defendant and upon which he was operating a coal mine with its attendant engine, shaft, and other appliances. The road was so constructed that it separated defendant's engine from his mining shaft and machinery at the top of the pit. The road was also so constructed as to cut off connection of the mine with another railroad, though the switch, chute, pit top and other connections were not actually taken. In estimating the damages to which the defendant is entitled: *Held*, (a) that it was proper for the jury to consider the number and speed of passing trains, the danger of accidents to defendant's employes, and the risks of damage by fires from passing locomotives; (b) that if it was necessary to change the railroad connection or make a new one, the reasonable expense thereof should be allowed; (c) that if it became necessary to wholly abandon the shaft, its value should be allowed as damages, and not the expense of a new one; (d) that defendant is entitled to damages from the loss of business owing to its railroad connec-

tion being cut off, from the time of the filing of the commissioner's report to the completion of the plaintiff's road; (e) that defendant cannot be required to accept as compensation licenses and privileges to go upon and use the right of way, or a release of a part of it to be used for another shaft; compensation must be made in money; (f) that it was error to instruct the jury to allow damages to the extent of the full value of the switch, chute, pit top, and other connections; although they may have been rendered valueless for the purposes for which they were designed, they may still have been useful for some purpose, and the jury should have allowed only the amount of their depreciation; (g) that it was error for the court to instruct the jury that the company, after taking the property, could not insist upon defendant using it either by a superstructure or by means of a subterranean device, or by other means which would tend to increase the danger to his employes or the inconveniences or dangers of operating the shaft and which would make it difficult to get careful and prudent men to work in the mine. This instruction in effect denied the company the right to show that the value of the property was not totally destroyed, and that the mine could still be operated.

APPEAL from Ray Circuit Court.

This is a suit to condemn a right of way 30 feet wide over lot 939, in block 122, out lot 19, in the town of Camden, Ray county, the property of defendant. Commissioners were appointed by the judge in vacation. They made an assessment of \$3,000 damages, and filed their report. This report was afterwards set aside by the court upon exceptions filed by defendant. The case was tried by a jury, and a verdict of \$7,000 returned, upon which judgment was rendered against plaintiff. The evidence shows that this lot was about 150 feet in length north and south, and 50 feet in width. Defendant also owned lots 938 and 940, adjoining and on either side of lot 939, being of the same dimensions. At the point where these lots are located the Missouri river runs nearly east and west. The track of the Wabash Railroad extends along the bank of the river near the water's edge. On the north side of and adjacent to the right of way of the Wabash Railroad a public street was located. These lots abutted on this public street. Plaintiff located its railroad adjacent to and parallel with the Wabash road, occupying the street by consent of the town, and providing another street north of its located line. Defendant also owned a large track of coal land lying north, northeast, and northwest of these lots. About the center of lot 939 defendant had sunk a coal shaft, by means of which his coal field was worked. North of the shaft about 45 feet, and on the same lot, defendant had located his engine house and engine by which the shaft was operated. Through lots 938 and 940 defendant had condemned its right of way to the vacated street on the south. From the river north the land ascended into the hills beyond the railroads. From a switch of the Wabash Railroad a spur or side track extended

opposite the shaft. At the entrance of the shaft was a superstructure, called a "pit top." From this two trestles, one above the other, extended towards the river. These trestles were provided with tracks, and, by means of small cars, the *debris* of the mine were carried over the upper one and dumped into the river, and the coal was carried over the lower one to the side track of the Wabash road, and loaded into its cars. The shaft was about 14 feet in dimensions east and west and 7 feet north and south. The coal and *debris* were brought up through the shaft by means of two cages, one on the east and one on the west side of the shaft, which were lowered and raised by means of a wire cable extending from the engine over a pulley at the top of the pit top. From the bottom of the shaft small rail tracks diverged to different parts of the mine, by which the coal was carried from the mine to the shaft, and raised by the cages. Plaintiff's railroad was located between this shaft and the engine house, somewhat nearer the engine than the shaft, thus separating them. In order to operate the mine it was evident that some readjustment of the existing arrangements would have to be made. Several plans were proposed, and evidence offered to prove their practicability, the expense necessary to make the changes and readjustment thereunder, and the time necessarily consumed in so doing. The land actually taken was of insignificant value. The damage claimed by defendant, and not controverted, by plaintiff, was on account of interruption of the mining business of defendant, the expense of readjustment, and the loss while necessarily engaged in making changes. The theories upon which plaintiff insisted the changes could be made, and upon which evidence was offered, were as follows: That the work could be operated without relocating either the engine or shaft, by what was denominated either an over pull or under pull. The former plan was to erect a superstructure at the engine, and operate the mine by a cable through this superstructure over the right of way to the pit top; the latter was to tunnel under the track, and make the connection through the tunnel. Another plan was to move the engine up the hill to the north, and pass the cable over the track to the pit top. Plaintiff's evidence tended to prove the practicability of these theories, and defendant's evidence tended to prove their impracticability. Defendant insisted that the only feasible arrangement that could be made was to abandon entirely the new shaft, sink another further up the hill, north of the location of plaintiff's railroad, and move the engine and engine house also north. This plan, it was contended, would necessitate the abandonment also of the connection with the Wabash Railroad, and delay the business of

defendant until a new connection would be made with plaintiff's road when built. Evidence was offered tending to prove the practicability of this readjustment, and the expense thereof, the time it would take to complete the change, and of damages for loss of the use of the mine until working arrangements could be perfected by connection with plaintiff's road. Plaintiff also advanced a theory for readjustment, which, it insisted, was practicable, and would entail much less expense than any of those proposed. This was to remove the engine to the south side of the location of its road, on the south end of either lot 938 or 940, which it had already condemned for its right of way. To prove the practicability of this plan plaintiff offered to prove that it had tendered to defendant a release to the south part of these lots to be used for locating the engine house and engine. This evidence was excluded. Over plaintiff's objection evidence was offered by defendant and admitted by the court tending to prove that there would be liability of fire escaping from locomotives and igniting the engine house and machinery and the superstructure to the shaft while in such near proximity to the railroad, and there would be also increased risk to laborers should the engine and shaft be separated by the railroad. Defendant filed a bill of the items of his damage as follows:

Damages for being cut off from the Wabash Railroad until completion of the plaintiff's road.....	\$30,000 00
Permanent damages for being cut off from the Wabash switches, etc.....	5,000 00
Value of present shaft.....	5,000 00
Damages to mining property, arising from uncertainty of sinking new shaft and danger of water and sand flowing in and damaging mines.....	5,000 00
Cost of moving and altering engine, new engine house, and pit top.....	2,000 00
Changes at bottom of mine.....	1,000 00
Damages to mines, arising from having to cross and recross railroad in going to and from same.....	1,000 00
	\$49,000 00

The court gave the jury a number of instructions asked by plaintiff, and also refused a number. Several were also given on request of defendant, and the court on its own motion gave instructions covering the whole case.

Gardiner & Lathrop and *C. T. Garner, Sr.*, for appellant.
J. D. Shewalter, for respondent.

MACFARLANE, J.—It would be impossible to review these instructions in detail within a reasonable limit, and without attempting to do so we will merely consider the legal propo-

sitions enunciated by them, and undertake to ascertain the law that should govern in determining the rule of damages as applied to the facts in this case.

1. The constitution, as well as common right and justice, requires that when a railroad corporation exercises the extraordinary power of appropriating to its own use the property of another, just compensation should be first paid. Just compensation implies adequate compensation, a fair equivalent, a just indemnity.

General principles of compensation.

On the other hand, some of the private rights of citizens must give way to great public enterprises; and, while the citizen is entitled to just compensation, he is entitled to no more than what is just and adequate. In ascertaining the compensation in such cases the ordinary rules for measuring damages, as far as practicable, have been applied. It has therefore been held that "the correct rule to be applied relates to the value of the land to be appropriated, which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be put, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it; and when less than the whole estate is taken then there is further to be considered how much the portion not taken is increased or diminished in value in consequence of the appropriation. The benefits derived, which are to be taken into consideration in the assessment of damages, are the direct and peculiar benefits resulting to the land in particular, and not the general benefits accruing to it in common with other land, which is enhanced in value by the erection of the improvements." *Mississippi River Bridge Co. v. Ring*, 58 Mo. 496; *St. Louis & St. J. R. Co. v. Richardson*, 45 Mo. 466; *Cooley, Const. Lim.* 567; *Pacific R. Co. v. Chrystal*, 25 Mo. 546; *Wyandotte, K. C. & N. W. R. Co. v. Waldo*, 70 Mo. 632. These rules have been acted upon in this state from the time the question first came before the courts. It has ever been regarded as eminently just and fair, and, in most cases, of easy practical application. No reason can be seen why it should not be used as the basis for estimating plaintiff's compensation in this case. The peculiar character of defendant's property, the underlying coal beds, which give it value, the machinery and appliances in use, necessary in making the property productive, the railroad connections, which facilitate the commerce of the productions, and the complications arising from all these, make the application of these simple rules exceedingly difficult in this case. The damages to be paid are to compensate for the injury to the whole of the property as it was left at the time the appropriation was made, in view of the uses to which the land appropriated was to be

applied. Any benefits the construction and operation of plaintiff's road would add to the property by way of increased facilities for marketing coal should have been deducted from the damage. Such benefits would be peculiar to this property on account of the uses made of it. It is evident the damage to the property should not be confined to the surface of the land and the machinery in use in the business, but should also apply to the internal arrangement of the mine, and the appliances therein provided for its economical and successful operation, and to all external arrangements which add to its value. If the shaft in use when the condemnation was made could no longer be used the damage would not be confined to the loss of the shaft, but should include such damage to the internal arrangement of the mine as would result from the necessary abandonment of any part of such appliances, or their readjustment to necessary changes. The facilities for transportation of coal and railroad connection with the mine is a valuable property right, which belongs to the owner of the land, and, if injured by the appropriation of the land, this would constitute a damage to the remaining property, for which defendant should be compensated, though the railroad switches and tracks making the connection belonged to the railroad company. 3 Suth. Dam. 441; Lewis, Em. Dom. § 235; Rigney v. Chicago, 102 Ill. 64. It is the duty of one sustaining damages by reason of the act of another to use all reasonable exertion to protect himself, and avert, as far as practicable, the injurious consequences of such act. Douglass v. Stephens, 18 Mo. 366; Haysler v. Owen, 61 Mo. 270; Waters v. Brown, 44 Mo. 303; 1 Suth. Dam. 148. It was therefore plaintiff's duty to adjust his property to its changed condition as soon as it could reasonably be done, and in such manner as would avert such damages as could be avoided by reasonable endeavors and expense. The damages should have been estimated as of the date of the assessment by the commissioners, and on the assumption that plaintiff had or would incur every reasonable expense and use every reasonable exertion in the management and readjustment of his property, to protect himself from damage. If the business of defendant was necessarily interrupted by reason of the appropriation of a portion of his land, compensation should have been allowed for the reasonable value of the use of the mine during the period of such necessary interruption. In estimating the damage for this cause it would have been proper to have considered the probable length of time the business would necessarily have been suspended, the season of the year, and all circumstances that would tend to increase or diminish the value of the business interrupted, and the consequent loss therefrom.

Mills, Em. Dom. § 192; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; Patterson v. Boston, 23 Pick. (Mass.), 425; St. Louis, V. & T. H. R. Co. v. Capps, 72 Ill. 188. Conjectural profits of the business in the future are too speculative and uncertain to be allowed as damages. Mills, Em. Dom. § 177; Pittsburgh & W. R. v. Patterson, 107 Pa. St. 464; Jacksonville & S. E. R. Co. v. Walsh, 106 Ill. 255, 14 Am. & Eng. R. Cas. 245. These principles were generally adopted and applied by the court throughout the trial, and the general instructions given fairly presented the rule of damage governing the facts and circumstances in the case. There are some special exceptions urged by appellant which deserve separate consideration.

2. The court instructed the jury, by amendments to some of those asked by plaintiff, in substance, that in determining the practicability of such proposed changes as required the operation of the shaft on one side of the road by means of the engine on the other side, they might consider the frequency of trains passing over the road, and the rapidity of their movements, the increased liability of injury to employes of defendant from accidents, and the risks of damage by fires from passing locomotives. Appellant insists that the court erred in so amending these instructions. It is true, as a general proposition, damages should be assessed on the assumption that the road will be properly constructed and operated, and that it will comply with all the laws of the state regulating its construction, management, and operation. For failure of duty in these respects, it will be liable to an action at common law, or the landowner will have such remedy as may be provided by statute. Chicago, M. & St. P. R. Co. v. Baker, 102 Mo. 553 (decided at this term;) Lyon v. Green Bay & M. R. Co., 42 Wis. 538; Fremont, E. & M. V. R. Co. v. Whalen, 11 Neb. 590, 5 Am. & Eng. R. Cas. 364. Notwithstanding these settled principles, which apply generally, we are of the opinion that the facts in this case are exceptional, and that the instructions as limited by the court were proper. When we remember the close proximity of the railroad to the engine on one side and the shaft and superstructure on the other, and that employes of defendant would necessarily be engaged over and about the track of the road, it will be readily seen that damage from accident may occur for which the railroad company would not be liable. It is clear that persons exposed to danger, as defendant's employes would necessarily be, could not perform their labors with the same degree of efficiency, and, at the same time, exercise the care to avoid danger which the law imposes on them, as they could if not

Elements of
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so exposed. The extra risk might also cause a demand for higher wages. Neither can a railroad company be held liable for all fires that may originate from its locomotives. They may occur through no fault of the company. Defendant would also be under obligation to exercise care and watchfulness, under the circumstances, to avoid and prevent damage from fires, and this duty might impose additional expense upon him. So it will be seen that the general rule cannot, in justice, be applied to its full extent under the facts in this case. It would not be proper to estimate the possible damage from fires or injuries to persons. Neither may ever occur, and to take them into the estimate would be mere speculation. We think they may properly be considered, however, in so far as they tend to depreciate the value of the whole property, and to affect the proposed changes, but no further. *Lewis, Em. Dom. § 497; Mills, Em. Dom. §§ 163, 166; Bangor & P. R. Co. v. McComb, 60 Me. 290; Ham v. Wisconsin, I & N. R. Co., 61 Iowa, 716, 14 Am. & Eng. R. Cas. 204; St. Louis, A. & T. R. Co. v. Anderson, 39 Ark. 167, 17 Am. & Eng. R. Cas. 97; Keithsburg & E. R. Co. v. Henry, 79 Ill. 290; Pierce v. Worcester & N. R. Co., 105 Mass. 199; White v. Charlotte & S. C. R. Co., 6 Rich. Law (S. Car.), 47.*

3. As has been stated, the connection of the mine with the Wabash Railroad was a valuable property right which belonged to defendant, and was a part of the property that may have been affected by the appropriation. **Connection with Wabash road—Damages for destruction.** Whatever damage was occasioned by the interference with this right should have been allowed in the estimate. If necessary changes and readjustment of engine, shaft, and other appliances for conducting the business rendered it necessary to change or modify the railroad connection, or to make a new one, then the reasonable expense of making such changes or making a new connection should have been allowed, and there was no error in the court so instructing the jury. If the appropriation rendered it necessary to wholly abandon the shaft, then its value should have been allowed as damage, and not the expense of making a new one. But in the consideration of a general scheme of readjustment of the appliances for working the mine, evidence of the cost of a new shaft would be proper enough. In considering the cost of a new shaft, mere speculations as to possible difficulties in the way of doing so should not be made. Such difficulties should be considered much as a contractor would regard them in estimating the cost, and allowances therefor should be made accordingly. The rulings of the court on this subject were substantially correct.

4. At the request of defendant the court gave the jury the

following instruction: "If the jury believe from the evidence that the strip sought to be taken lies immediately between the engine house and the shaft of defendant; that defendant had also, a switch and connection with the Wabash Railroad, by means of which, and of tracks and tramways leading from the shaft, cars on said switch were loaded; and if the jury further believe from the evidence that by the location of the plaintiff's road and the taking of the said strip the shaft of defendant cannot be operated with the engine on the opposite side of the track with safety, and that for that reason he, the defendant, has been unable since the location of the plaintiff's road to operate his coal-shaft,—then the defendant is entitled to recover all the damages, if any, the jury believe from the evidence he has sustained thereby from the date of the filing of the report of the commissioners and the payment of the money into court by the plaintiff up to the completion of the plaintiff's road; such amount of damages to be determined by the rule hereinafter stated." Plaintiff objects to this instruction on the ground that the period for which it is to be held liable for loss of business is too indefinite and uncertain to form a basis for calculating damages. If the entire use of the Wabash road as a means of transportation was destroyed by the appropriation of defendant's land, and no rearrangement could have been made, then the damage on this account should have been the entire value of such connection, which should have been reduced by the benefits that might thereafter have been derived from the operation of plaintiff's road. The damage to which defendant was entitled was the difference between what was the fair value in the market of his whole property before and its value after the appropriation, in view of the uses to which the land condemned should thereafter be applied. The schemes for readjustment, and the evidence of the practicability and cost thereof, were only allowable as what seems to be a reasonable and practical method of estimating such difference of value. Both parties seem to have agreed upon the theory for estimating the damage and benefits upon the basis of the cost of certain readjustments of the works, and the loss of business until they could be effected. The instruction complained of was only following out the theory adopted by the parties. Plaintiff was entitled to have the damage reduced by the value of the benefits of its road when completed. These benefits would consist of the means for transportation of defendant's coal to market. There would be the same difficulty and uncertainty in determining when these benefits would begin, as in determining when defendant's losses from being deprived of his connection with the Wabash road would end. Defendant's property

could only be appropriated by plaintiff for the purpose of building its road thereon. The court had the right to assume that it would do so in a reasonable time thereafter. Plaintiff could have given the court and jury approximately the time at which it would be completed. The rule given by the court was as definite and certain as any that could have been given, and at the same time allow plaintiff the advantage of the benefits of its road in reduction of damages.

5. The court also gave the jury the following instruction on the request of defendant. "That, except at public or private crossings, a railroad company is entitled to the exclusive possession of its right of way, and no person has the right to go upon such railroad track, nor use the surface of the right of way, for any purpose, nor can any railroad company either grant or consent to any such use; this rule being not alone for the benefit of the railroad, but also of the public. And if the jury believe from the evidence that none of the devices or means introduced in evidence could be erected or made, or, if erected or made, could be successfully operated or used, without the agents or employes of defendant going on the right of way of plaintiff, then the jury are instructed defendant would not be permitted to erect or maintain the same; or if, on the other hand, the jury should believe from the evidence that the erection, making, or maintenance of any such devices under or over the track would in any degree endanger the operation of such railroad, or the safety of the traveling public, no matter how slight the danger or how improbable the occurrence might be, the defendant would have no right to erect, make, or maintain the same, or the railroad company any authority to consent to any such erection." Though the interest acquired by a railroad company to its right of way through condemnation proceedings is regarded as a mere easement, yet the law contemplates the right to an absolute and exclusive possession and control thereof as against the private rights of the owner of the fee, the proprietors of adjacent land, and all others; the only exception made by the statute being for the benefit of the owner of a farm divided by the road, who is entitled to a private way or farm crossing under § 809, Rev. St. 1879. In view of the nature of the business of a railroad company, and its obligations to the public, such exclusive possession is necessary and proper in order that it may perform fully the purposes for which it is authorized and used. Judge REDFIELD, in *Jackson v. Rutland & B. R. Co.*, 25 Vt. 159, says: "The railroad company must have the right at all times to the exclusive occupancy of the land taken, and to exclude all con-

Compensation
on basis of
company's ex-
clusive right
to possession.

current occupancy by the former owner in any mode and for any purpose." So, in this state, one in no manner connected with the railroad company, who goes upon its track at a place other than a public or private crossing, is a trespasser. Rev. St. 1879, § 809; *Rine v. Chicago & A. R. Co.*, 88 Mo. 398. No sufficient reason can be seen why, by agreement between the parties interested, certain rights, not inconsistent with the public interest, might not have been reserved by the landowner, so as to secure to himself a limited use of the right of way under such circumstances as existed in this case. Yet such a reservation must have been by consent of both parties; neither could have been required to grant or accept them. Defendant was entitled to compensation in money, and could not, without his consent, have been required to accept in lieu thereof licenses or privileges, however beneficial to him they may seem to be. After a failure to agree on the compensation or other arrangements mutually satisfactory, the parties go into court, not as contracting parties, but as antagonists, and each has the right, if he sees fit to do so, to stand on his legal rights, and insist on his legal remedies, and yield nothing of either. So the parties stood in the trial of this case; plaintiff demanding the unrestricted right of way, and defendant insisting on just compensation in money for his land appropriated. Efforts to agree which were required to be made before legal proceedings could be instituted having failed, all previous negotiations or offers were at an end, and could only be viewed in the light of efforts to compromise; and evidence of their character and extent was not admissible. Plaintiff had no more right to tender, or to prove that he had tendered, defendant certain privileges, than defendant had to offer to donate, or prove that he had offered to donate, the right of way if a different location should be adopted. *Mills*, Em. Dom. § 112; *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 4; *Hill v. Mohawk & Hudson River R. Co.*, 7 N. Y. 155; *Chicago, M. & St. P. R. Co. v. Melville*, 66 Ill. 329; *Central Ohio R. Co. v. Holler*, 7 Ohio St. 220; *Chesapeake & O. R. Co. v. Halstead*, 7 W. Va. 302; *Lewis*, Em. Dom. § 505.

6. What has been said substantially disposes of the question raised on the trial by the offer of plaintiff to prove a tender to defendant of a release of part of its right of way on the south end of lots 938 and 940 for the location of his engine. This tender was made pending negotiations, prior to the institution of proceedings, or pending the inquiry of damages by the commissioners. For the reasons above stated defendant could not be required to accept anything but money in com-

Tender by
company of
another loca-
tion.

compensation for his land. While the tender was ostensibly gratuitous, the purpose of it unquestionably was with a view of reducing the damages, and was nothing more than the offer of privileges as part compensation. While duty may require of one sustaining damage from the act of another to use all reasonable exertion and expense to avert as far as practicable the injurious consequences of such act, yet in a case of this character, in which property is taken for public uses without the consent of the owner, no recognized principle can be imagined which would require the landowner to accept other land in exchange as compensation, in part or in whole for the land appropriated. We are cited to no authority, nor have we been able to find any, sustaining such a doctrine. It may also be seriously questioned whether, after land has been appropriated to public uses, it can be transferred unconditionally to another for a private use. The authorities are against such right. *Mills, Em. Dom.* § 57; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 209, 29 Am. & Eng. Corp. Cas. 400; *Strong v. Brooklyn*, 68 N. Y. 1. If the offer was that of a mere license, it would have been revocable at the pleasure of the licensor, and the right to revoke may have been exercised before any benefits were received from the license. In any event, defendant could not, against his consent, be required to accept the offer of a license while it was questionable whether the power to confer it existed, and while it was doubtful whether, if accepted, it would have subserved the practical purpose for which it was designed. We think there was no error in excluding the evidence.

7. Defendant's second instruction was as follows: "If the jury believe from the evidence that defendant has, in connection with the Wabash Railroad, a switch and coal chutes; that by the taking of his strip between the engine house and shaft he will be compelled to sink a new shaft, and that this will cut him off from the Wabash,—then the plaintiff is required to erect and build for the defendant, on demand therefor, a switch and switch connection with its road, defendant paying the cost thereof; and if the jury should believe from the evidence that by sinking such shaft defendant will be cut off from the Wabash Railroad, with the right of way of plaintiff's road between the new location and said Wabash Railroad, then the jury will find for the defendant on the second item of damages claimed for such sum, not exceeding five thousand dollars, as they may believe from the evidence was the value of the switch, chutes, pit top, and other connections, thus rendered useless for the purposes for which they were erected, such

Damages for
switch, chute,
pit top, etc.

value to be estimated at the time of taking said strip." We think there was error in this instruction. From the fact that the switch, chutes, pit top, and other connections may have been rendered valueless for the purposes for which they had been designed, it does not follow that they were valueless for all other purposes. This property was not actually taken. It still belonged to defendant. When property is taken its value should be paid. When not taken, but only injured, its depreciation in value only should be allowed. Values should not be estimated exclusively for any particular use. Everything which gives it intrinsic value should be taken into consideration, and its capabilities for any use to which it may be put. 3 Suth. Dam. 414; Lewis, Em. Dom. § 464. The damages on this item would have been the depreciation in the value of the property mentioned, and not the full value.

8. The third instruction given for defendant was as follows: "The jury are instructed that in condemning a right of way through or over defendant's property the plaintiff has no right to take the same, and, after so taking it, insist upon the use of the strip by the defendant in the necessary running of his business either by a superstructure, ropes, and pulleys overhead, together with a bridge, or by means of subterranean device, or by any means whatever, provided any such means or device in any degree increases the dangers to the lives and limbs of his employes, or so increases the inconveniences or dangers in running and operating the shaft as for that reason he would be unable to get careful and prudent men to work in said mine, or if from any causes any such system would be impracticable, and he, the defendant, could not, for any such reasons, compete with other persons engaged in the same business." This instruction may also have misled the jury. The object of the trial was to ascertain the damage to the property of defendant by the appropriation. In order to prove the damage it was competent for defendant to offer evidence which might tend to prove a total loss of the use of his lands for mining purposes, and, on the other hand, plaintiff had the right to show that the property could still be used and the mine operated by certain changes of the appliances necessary to its operation. The jury was to determine the damage from all the evidence. If the mine could be worked by means of the changes proposed by plaintiff, then the expense of the change and the value of the property thereafter should have been considered by the jury, though greater expense and inconvenience might attend its operation on account of the changed condition. The difference in value should have been estimated, and compensated for in money.

Right of jury
to consider
possible
changes avoid-
ing total loss.

9. We are not able to see that the fourth instruction authorized an estimation of the value of the old shaft and also the cost of a new one, as contended by plaintiff.

Value of shaft
—Cost of new
one.

That instruction is as follows: "If the jury believe from the evidence that by reason of the taking of the strip of ground thirty feet wide by plaintiff it is necessary for the defendant, in safely or properly conducting his business, to sink a new shaft as declared in other instructions, then they will find for the defendant as to such items; and if the jury believe from the evidence that in sinking a new shaft there are elements of uncertainty which make the same hazardous, and which increase the value of a shaft already successfully sunk and in successful operation over the actual cost of sinking it, then the jury are instructed that in arriving at the value of the present shaft they are not confined to its actual cost merely, but should add thereto such further or additional sum as will represent the true value of the shaft already sunk and in operation, and for that sum you should find for the defendant, in that case, under the third and fourth items, not exceeding ten thousand dollars on both items; and in arriving at the value of the shaft, it is not to be fixed at a forced sale, but its value in and in connection with the business it was used for." The reference in this instruction to the third and fourth items of damages contained in defendant's bill of particulars did not probably mislead the jury, though such a reference should not have been made. Instructions should be complete in themselves, and not remit the jury to the pleadings to ascertain their scope or meaning. On account of the misdirection contained in instructions 2 and 3 the judgment is reversed, and the cause remanded. All the judges of this division concur.

Condemnation of Right of Way Across Mining Lands—Damages.—See *Midland R. Co. v. Miles* (Eng.), 24 Am. & Eng. R. Cas. 137, note 142; note 17 *Id.* 116; *Jenkins v. Central Ontario R. Co.*, 17 *Id.* 116.

Condemnation of Placer Mining Land—Instructions as to Damages Owing to Presence of Mineral.—In proceedings to acquire a right of way for a railroad over placer mining property, the court charged the jury "that the fact that the land is designated as 'placers' and that the title thereto was acquired under the mining laws of the United States, constitute no evidence either that the ground in question contains valuable deposits of gold or other mineral, or that the same is valuable for placer purposes. This instruction was preceded by the following: "That in determining the compensation for the land taken, and the resulting damages, if any, to the remaining land, they may consider not only the uses and purposes to which it is now applied, but also any other reasonable use to which it may be adapted or might be appropriated by men of ordinary prudence and judgment. That, if they believe from the evidence the land contains deposits of gold, they may consider that fact as bearing upon the question of the value of the premises; and that, if the presence of gold enhances either

the market value or the intrinsic value thereof, due weight must be given to that fact." *Held*, that the instruction first set out could not be considered as objectionable in view of the modifications imposed by the instruction preceding it. *Twin Lakes Hydraulic G. M. Syndicate v. Colorado Midland R. Co.*, (Colorado, June 5, 1891), 27 Pac. Rep. 258.

CHICAGO & PACIFIC R. CO.

v.

HILDEBRAND *et al.*

(*Illinois Supreme Court, March 30, 1891.*)

Eminent Domain—Damages—Borrowing Earth—Instructions as to Payment of Taxes on Land Taken.—The easement of a railroad company in land taken for the purpose of obtaining material for the construction of its road, by the exercise of the right of eminent domain, is treated as an estate or an interest in the land, and it is error for the court, in condemnation proceedings, to instruct the jury that the railroad company will not be required to pay taxes on the land so used by it.

Right of Railroad Company to Create Nuisance on Land Taken for Purpose of Obtaining Material—Instructions.—Where a railroad company takes land for the purpose of obtaining material for the construction of its road, it is error for the court to give an instruction implying that the railroad company acquires the right to create a nuisance on such land by leaving holes therein, and grass and other combustible materials thereon, and neglecting to drain the same, whereby the owner of the dominant estate may be injured in his rights without any right to recover therefor from the railroad company.

Damages for Inconveniences Which Are "Largely Conjectural"—Instructions.—It is error for the court, in condemnation proceedings, to instruct the jury that in estimating the landowner's compensation, they should consider all appreciable injuries and inconveniences to land not taken "although such injuries and inconveniences may be largely conjectural." The words "largely conjectural" are misleading, since the jury may infer therefrom that speculative damages are recoverable.

"Contiguous Property"—What Constitutes.—Where a railroad company condemns an additional strip of land on one side of its track where it passes through the compact body of a farm, that part of the farm on the other side of the track is "contiguous" to the strip of land so taken.

APPEAL from Ogle Circuit Court.

Ed. F. Dutcher, for appellant.

J. C. Seyster and Frost & McEvoy, for appellees.

SCHOLFIELD, C. J.—This is a proceeding instituted by appellant in the circuit court of Ogle county, to condemn four tracts of land, consisting of long strips parallel with the appellant's right of way, for use in constructing an additional track in maintaining appellant's road. The tracts are designated as Nos. 1, 2, 3, and 4—No. 1 belonging to the estate of John Hildebrand deceased, subject to a mortgage to Lewis Hildebrand, Sr., No. 2 belonging to

the legatees of Frederick Nashold, deceased, No. 3 belonging to Isaac Crill, and No. 4 to John I. Crill. Proper parties were made defendants, and brought before the court, and judgment was rendered in favor of the separate owners for compensation for land taken, and damages to lands not taken. A single appeal was taken by the appellant, that brings the entire record of condemnation of each tract before us for review. The judgment, however, as to each tract, is, in effect, a separate judgment, as much as if rendered in distinct proceedings, and therefore a reversal of the judgment as to one tract does not necessitate a reversal as to the other tracts. Upon the trial of the case, evidence was given of the value of the lands taken, and also of the damages to result from the use of the lands for the purpose for which they are taken to other lands of the several owners not taken; and at the instance of the owners of tracts No. 1 and No. 2—Nashold's and Hildebrand's—the court, over appellant's objection, instructed the jury as follows: "No. 2. The court instructs you that the Chicago & Pacific Railroad Company desires to have the right to use certain lands belonging to the Nasholds and Hildebrands for the purpose of borrowing earth therefrom to construct an embankment on their right of way, and in exercising its right to borrow earth it will be at liberty to borrow therefrom all it desires that may be necessary to construct such embankment. It will not be required to so borrow such earth or drain the land borrowed from as to prevent water from standing in the places from which the earth will be borrowed, so long as it does not interfere with any existing or natural means of drainage. It will not be required to pay taxes on the lands so used by the company. It will not be required to fence the same, and will not be required to keep the same clear from weeds, or brush, or any material that may grow thereon." It is not true that the appellant will not be required to pay taxes upon these tracts of land. The petition represents that it is necessary that appellant "shall have and immediately possess for use in constructing said additional track and maintenance of said railroad" these tracts of land, and it concludes by praying that "the compensation to be made to each, respectively, be ascertained, and such proceedings be had therein as by the statute in such case made and provided are required." The statute provides (section 10, chap. 47, Rev. St. 1874) that, in such cases, the court "shall adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property, and have the use of the same, upon payment of full compensation; * * * and such order, with evidence of

**Liability of
company to
pay taxes on
land taken.**

such payment, shall constitute complete justification of the taking of such property." The judgment here is that the said petitioner, the Chicago and Pacific Railroad Company, do enter upon the following tract of land in said petition described, and take therefrom material necessary for the construction of its railway. This vested an easement in the tracts in the railroad company. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 94 Ill. 83; 1 Redf. Ry. p. 251, par. 8 and note 11, 6 Am. & Eng. Ency. Law, p. 142; *Huntington v. Asher*, 96 N. Y. 604. And, the easement being in gross, it is so far of the character of an estate or interest in the land that it is treated as such. 6 Am. & Eng. Ency. Law, and *Huntington v. Asher*, *supra*. The statute requires the appellant to pay tax on all real estate held for right of way, (section 41, chap. 120, Rev. St. 1874); and on all other real estate belonging to it, (section 46 of the same statute.) Nor is it true, as is to be implied from this instruction, that appellant by this easement acquires the right to create a nuisance thereon by leaving holes therein, and grass and other combustible materials thereon, whereby the owner of the dominant estate may be injured in the enjoyment of his legal rights without any right of recovery therefor from appellant. The duty and liability of appellant in respect to such nuisances are precisely the same in respect of the land not taken as that of any other owner of land adjacent to that of the owner of the dominant estate in these tracts. The instruction was therefore erroneous, and it was calculated to mislead the jury.

Right to create nuisance on land.

Another instruction given at the instance of the owners of the tracts Nos. 1 and 2 is as follows: "No. 3. The jury are instructed that in estimating just compensation to be paid to the defendants in this case on account of the use described in the petition, as therein mentioned and described, and the damages, if any, to the residue of the farms in question, you should take into consideration all injuries and inconveniences which are appreciable, and which you believe from the evidence are reasonably probable and likely to result from the use of the land as sought in this case, although such injuries or inconveniences may be largely conjectural, and not susceptible of definite ascertainment. Such damages are neither imaginary nor speculative, but are legitimate items of damage to be considered, and you, upon the consideration of all such damages as shown by the evidence, should determine what amount will be a just compensation to the owners of the premises in question." We think the words "largely conjectural" render this instruction misleading, and that the instruction therefore ought

Speculative damages—Instruction.

not to have been given. We have frequently held that mere possible, speculative, or remote damages do not form the proper basis for a recovery in such cases, (*Chicago, B. & N. R. Co. v. Bowman*, 122 Ill. 595; *Kiernan v. Chicago, S. F. & C. R. Co.*, 123 Ill. 188;) and as between these and damages "largely conjectural" the common mind will fail to perceive any tangible distinction. For the giving of these instructions, the judgment in favor of Pauline Hildebrand, Emma L. Hildebrand, Lewis J. Hildebrand, and Alfred E. Hildebrand, for the taking of lot No. 1, and for damages to other property belonging to them not taken; and the judgment in favor of Mengo Nashold, Wellington Nashold, Alice Nashold, Martin Nashold, Emma Nashold, Laura Lines, Thomas H. Lines, Rosella Nashold, Charlotte Thompson, Carroll Thompson, Daniel E. Nashold, Jennie Nashold, Carrie Nashold, Minnie Nashold, Margaret Nashold, and Jacob Martin, executors of the last will and testament of Frederick Nashold, deceased, for taking No. 2, and for damages to other property belonging to them not taken,—are reversed, and the causes as to them are remanded to the court below for another trial.

It is objected against the remaining judgments that the jury were instructed to render a verdict for damages to property not taken, not contiguous to that taken, being on the opposite side of the railroad, whereas, by stipulation between the parties made and filed to obviate the necessity of filing cross bills, it was only stipulated that damages should be assessed as to "contiguous property." The objection is, in our opinion, susceptible of two answers, either of which is sufficient. In the first place, where a single compact body of a farm is crossed by a railroad disconnecting the body into two parts, each part is "contiguous" to the railroad so crossing it; and the taking of additional lands subsequently for right of way, or for constructing, as here, an additional track, is to be regarded only as an enlargement of the original quantity of land taken, and as fairly within the scope of design of the original taking, and so each of the several parts of the farm is to be regarded as contiguous to it. The farm may still be used by the means of crossings, as a unit, and therefore an injury to one part is an injury to, because a depreciation of value of, the whole; and if contiguity to any part of it causes this depreciation it will be sufficient. In the second place, it is not made to appear here that any appreciable damages were or could have been awarded for injury to land on the north side of the railroad, for it is not made to appear that any definite, substantial part of the farm lies on that side of the railroad.

"Contiguous" property.

Objection is urged that the damages assessed as to these two tracts are excessive. We are unable to concur in this. There was evidence, if believed, fully sustaining the amount of the verdict. Objection is also urged that the court erred in refusing and modifying instructions. Our attention is called to no specific rule in this respect which we regard as erroneous. The instructions, as given at the instance of appellant, seem ample for the purposes of the case. The judgments in favor of Isaac Crill, John I. Crill, and Peter Jones are affirmed. The clerk will tax the costs in this court as to each of the judgments separately. Where the judgments are reversed they will be taxed against the appellees, and where they are affirmed against the appellant.

Affirmed in part, and reversed in part.

Damages Where Land is Condemned for Purpose of Obtaining Earth and Gravel.—See *Vezina v. The Queen* (Can.), 44 Am. & Eng. R. Cas. 73.

What is to be Considered as a Single Tract of Land—Contiguous Lands.—In an action for damages for injuries to lands by reason of the appropriation of a right of way for a railroad company across the same, damages must be confined to the tract of land over which the right of way is condemned, unless the owner has other lands contiguous thereto, and so situated with respect to the same that the value is appreciably augmented by their use in connection therewith as a single farm, and the appropriation of said right of way has destroyed or seriously interfered with such use. *Leavenworth, N. & S. R. Co. v. Wilkins*, (Kansas, March 7, 1891,) 26 Pac. Rep. 16. See also *Currie v. Waverly & N. Y. Bay R. Co.* (N. J.), 44 Am. & Eng. R. Cas. 100, note 106.

Damages to Land as a Whole—Effect of Government Subdivisions.—The damages allowed the landowner are such as are done to the body of his land as a whole. Such damages are not limited to the minor government subdivisions over which the road may pass, and the company cannot avoid payment of damages done the owner's entire farm by selecting out and describing in its petition the forty-acre tracts through which the road is located. *Chicago, M. & St. P. R. Co. v. Baker*, 102 Mo. 553.

Facts Which Jury May Consider in Assessing Damages—Inconvenient Shape of Land—Liability of Stock to be Killed—Fires from Passing Engines, etc.—In *Chicago, P. & St. L. R. Co. v. Graney*, (Illinois, Nov. 5, 1890,) 25 N. E. Rep. 798, which was a proceeding to condemn a right of way for a railroad company, the court instructed the jury that "in assessing the damages to the owner of the land, they are justified in taking into consideration not only the value of the land actually taken, but all facts which contribute to produce damages to that not taken. As, if it appears from the evidence that the farm is cut in an inconvenient shape for cultivation or other farming purpose; or that the land is divided or cut off from the water, pastures, or improvements; or that any spring, well, or water supply is destroyed or cut off from the dwelling house; or that there is danger from killing or injuring stock; or damage from fire from passing engines; or that there will be inconvenience in crossing or recrossing the right of way and track in going from one part of the farm to another,—the injury, if any, by reason of the field or farm being thrown open until the company fences the right of way, and all damages that are reasonably probable to flow from the construction and operation of the proposed road." *Held*, that the effect of the instruction was that the jury were to take into con-

sideration all facts which contribute to produce damage to the land not taken, as they appear from the evidence, and was, therefore, not erroneous.

In proceedings instituted by a railroad company to condemn a right of way, the court instructed the jury that in assessing damages they might consider "not only the value of the land taken, but all the facts which contribute to produce the damages to that not taken, as that the farm is put in worse shape for cultivation or pasturage, that some portions of it are more dangerous for use, that there is danger of fire from passing engines, and all other actual inconvenience and damages the property may sustain in its use, not only for the present, but for the future." *Held*, that this instruction was proper. *Chicago, P. & St. L. R. Co. v. Nix*, (Illinois, March 31, 1891,) 27 N. E. Rep. 81.

In proceedings to condemn a right of way, the court instructed the jury as follows: "The court instructs the jury that the law is that, when a railroad condemns land for right of way, the jury, in assessing damages to the owner, may take into consideration not only the value of the land taken, but all the facts which contribute to produce the damages to that not taken, as that the farm is put in a worse shape for cultivation or pasturage; that some portion of it is more dangerous for use; that there is danger of fire from passing engines; and all other actual inconvenience and damages the property may sustain in its use, not only for the present, but for the future." *Held*, that the instruction was proper. The court said: "This instruction is sustained by the views of this court as expressed in *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 100 Ill. 21, 2 Am. & Eng. R. Cas. 454; and *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill. 363, 29 Am. & Eng. R. Cas. 558." *Chicago, P. & St. L. R. Co. v. Blume*, (Illinois, May 9, 1891,) 27 N. E. Rep. 601.

In a condemnation suit, the court instructed the jury that in estimating the damages to the coal mine of the defendants, they should consider as elements of damages any changes they may believe from the evidence to be made necessary, as well as all actual inconvenience and annoyances which the evidence shows would result to the defendants in the operation of their mine. The plaintiff contended, that this instruction assumed as a fact that each of the changes in the mining property and its appurtenances made necessary by the construction of the road would constitute an element of damage, while, as plaintiff contended, some of them might in their final results be of essential benefit. The court held, however, that there was no force in this objection, saying: "If by reason of the construction of the railway the defendants' switches and sidetracks must be taken up and relaid in whole or in part, their tramway remodeled or rebuilt, their scales taken up and removed to another place, and like changes made in other parts of their property, all involving the expenditure of money, as the evidence seems to show will be the case, there can be no doubt that such changes are proper matters to be taken into consideration by the jury in the estimation of damages. It may be that some of these,—as, for instance, the tramway, if rebuilt upon a better plan, of new materials, and with a double track,—may be more valuable and more serviceable than now, but that makes it none the less true that the defendants have a right to have such changes considered by the jury." *Chicago, P. & St. L. R. Co. v. Wolf*, (Illinois, March 31, 1891,) 27 N. E. Rep. 78.

Value of Improvements Placed on Land by Railroad as an Element of Damages.—In an action to condemn a right of way for a railroad, commenced after the construction of the road, the landowner is not entitled to be paid the value of improvements placed upon the land by the railroad company, or its predecessor in interest, before the commencement of the condemnation proceedings. *San Francisco & N. P. R. Co. v. Taylor*, 86 Cal. 246.

In *Newgass v. St. Louis, A. & T. R. Co.*, (Arkansas, Jan. 17, 1891,) 15 S. W. Rep. 188, it was held that the value of a railroad already constructed on the land by the railroad company or its vendors is not to be included in the damages assessed, and in determining the value of the land taken any appreciation or deterioration that may have resulted to it specially from the building of the road on it will be disregarded, but such as may thereby have resulted to it in common with other lands in the neighborhood will be considered. See, also, *Albion River R. Co. v. Hessner* (Cal.), 44 Am. & Eng. R. Cas. 125, and note p. 129.

1 **Liability of Teams to Become Frightened as an Element of Damage.**—In *Florence, E. & W. V. R. Co. v. Pember*, (Kansas, March 7, 1891,) 26 Pac. Rep. 1, it was held that in assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the liability of teams to become frightened, or that additional care by the landowner may be necessary in the future as to such teams, by reason of the proximity of the railroad, does not of itself constitute any basis for special compensation. Such damages are speculative, and not the proper subject of inquiry and damage.

Noise Made by Trains as an Element of Damages.—The noise made by passing trains is a proper incident to the operation of a railroad, and in so far as such noise will have a tendency to render farm land less desirable as a place of residence, and therefore, less valuable in the market, it is an element of damage which the jury may consider in assessing damages for a right of way taken by a railroad. Accordingly, it is proper for the court to refuse to instruct the jury that "in this proceeding you cannot allow any damages on account of the noise made by passing trains." *Chicago, P. & St. L. R. Co. v. Nix*, (Illinois, March 31, 1891,) 27 N. E. Rep. 81.

Value of Farming Land if Divided into City Lots as an Element of Damage.—Where farming land is taken by a railroad for a right of way the jury ought to value such land as a whole, in the condition it was immediately before it was condemned, and are not to consider what it would bring if divided into lots and blocks, and made a part of a city near by. *Kansas City & T. R. Co. v. Splitlog*, (Kansas, Dec. 6, 1890,) 25 Pac. Rep. 202.

Consideration by Jury of Erection of Fences and Crossing by Company—Instruction.—The value of the owner's entire tract with the railroad location on it is to be estimated on the basis that the company will erect and maintain farm crossings as required by statute, and it is error to charge the jury not to consider any advantage arising from the erection of fences and farm crossings by the company. *Chicago, M. & St. P. R. Co. v. Baker*, 102 Mo. 553. The court said: "The land owner should be allowed the difference in value of his whole tract of land before and after the location of the railroad over and across the same; and in applying this rule the jury should consider, in favor of the owner, not only the amount and value of the land actually appropriated, but they should also take into consideration the inconveniences which will arise in going from one portion of his land to another, the grade at which the road is constructed, and the shape in which the land not taken is left. On the other hand, the jury, in reaching a conclusion, should consider in favor of the plaintiff those benefits, if any, which are immediate and direct to the tract, arising from the construction of the road; but benefits which are common to other lands in the same vicinity should be excluded. If the railroad company is not required by law to fence its right of way, then the additional fencing rendered necessary to the reasonable use and enjoyment of the land not taken is a matter to be considered by the jury in favor of the land owner. *Lewis*, Em. Dom. § 498; *Mills*, Em. Dom. § 212. The same principle applies in respect of farm crossings, where the company is not required to make and maintain them. But by our statute it is made the

duty of the railroad company to erect and maintain fences on the sides of its road, and to make and maintain all necessary farm crossings. Should the company, after three months from the completion of the road, fail to make and maintain such fences and crossings, the land owner may do the work himself, and the statute gives to him a cause of action against the company for the cost of the work, and for his time and trouble in doing it. As this duty of making and maintaining fences and farm crossings is imposed upon the company, and as a specific remedy is given by statute for a failure to perform that duty, it is clear that building fences along the sides of the road, and making farm crossings, do not constitute any part of the damages to be awarded the land owner. 3 *Suth. Dam.* 444; *Jones v. Chicago & I. R. Co.*, 68 *Ill.* 380; *Winona & St. P. R. Co. v. Waldron*, 11 *Minn.* 515, (Gil. 392.) In the case before us, the company complied with the statute in respect of fences and farm crossings. Any loss, inconvenience, or damage resulting to defendant from a failure to make and maintain fences and farm crossings, after the expiration of the three months, should not be taken into account as augmenting the damages to be awarded. But it was the duty of the jury to take into consideration the fact that the company was bound to erect and maintain such fences and crossings, and they should estimate their damages on the supposition that the company would perform its duty in these respects. In the case last cited it was held that, where the railroad company is required by statute to construct such fences, the damages for taking the land should be assessed upon the basis of the construction of such fences by the company, in accordance with the statutory requisition. The instruction in question excludes from the consideration of the jury any advantage arising from the erection of fences and the making of the farm crossings and it was error to give it. We do not say that the cost of building fences and making farm crossings should be estimated, and the estimated amount deducted from the damages; for it is not true, as counsel for plaintiff seems to suppose, that these fences are built for the sole benefit of the land owner. What we say is this: that in estimating the value of the entire tract of land, with the railroad located over and across it, the estimate should be made on the basis that it is the duty of the company, and not the land owner, to erect and maintain fences and farm crossings. It must be apparent to any one that the damages will not be as great where the company makes and maintains fences and crossings as where that duty falls upon the land owner."

Additional Fences as an Element of Damages.—In assessing compensation for the taking of land for a railroad, where there is no evidence that to use and enjoy the land as it would probably be used in the future, any additional fences would be necessary, there is no error in a charge that the landowner is entitled to nothing for fences. *Newgass v. St. Louis, A. & T. R. Co.*, (Arkansas, Jan. 17, 1891), 15 *S. W. Rep.* 188.

Consideration of Increased Value of Land Owing to Construction of Bulkhead by Railroad.—Where a landowner consents to the construction of a bulkhead by a railroad company, entirely outside of a strip of land taken for a right of way, on condition that the bulkhead should be without cost or expense to him, the increase in the value of the land by reason of the construction of the bulkhead cannot be taken into consideration in estimating the landowner's damages. *Harris v. Schuylkill River E. S. R. Co.*, (Pennsylvania, April 6, 1891), 21 *Atl. Rep.* 590.

Former Trespass by Company not to be Considered in Estimating Compensation.—In *Canton, A. & N. R. Co. v. French*, (Mississippi, Jan. 19, 1891), 8 *So. Rep.* 512, it was held that a railroad company will not be relieved of liability for a trespass consisting of an unlawful entry upon land, by subsequent proceedings to secure a right of way. Accordingly, in con-

sidering what is due compensation for the easement so acquired subsequent to the trespass, the trespass itself is not involved, and is not to be considered. The court said: "The jury of inquest could only determine what injury would be sustained by the landowner by the continuance of the railway over the land as it then was, and could not properly inquire as to what damages the owner of the land had sustained by reason of injuries originally done her adjacent realty. Those injuries had long been done, and the then condemnation involved only a consideration of what the right of way was worth. The condemnation then could only refer to compensation for the loss of the land embraced in the right of way, for no injuries to the land, other than those already done by the original trespass, were to occur. The trespass had been committed, and the injuries resulting therefrom were not involved in second condemnation. The only compensation the jury of inquest could legally award was that for the right of way, pure and simple, and compensation for subsequent injury. The original trespass and its resulting injuries was wholly beyond the domain of that jury's consideration. The liability of the railroad for the trespass had been incurred and was fixed, and could not be affected by the subsequent condemnation, in which it acquired the right of way over the land in its then condition—the condition in which the jury found it when they viewed it."

Landowner Cannot Recover for Independent Trespasses Committed by Company Outside of Land Appropriated.—The owner of land taken and appropriated by a railroad company for railroad purposes in condemnation proceedings can recover in such proceedings only full and complete compensation for all his losses suffered by him, with respect to the entire tract of land, as a result of such appropriation and the construction and operation of the railroad in a legal and proper manner; and cannot recover in such proceedings for independent trespasses committed by the railroad company or its agents outside of the land appropriated by the railroad company. For the recovery of damages for any such independent trespasses the landowner must resort to some other action or proceeding. *Leavenworth, N. & S. R. Co. v. Herley*, (Kansas, March 7, 1891), 26 Pac. Rep. 23.

Damages for Flooding Land Not Taken—Injuries Resulting from Improper Construction.—If the appropriation of a part and its use as a railroad results in flooding the land not taken, the damages so occasioned should be included in the assessment, but no account should be taken of injuries which may result from an improper construction or maintenance of the roadbed. *Newgass v. St. Louis, A. & T. R. Co.*, (Arkansas, Jan. 17, 1891), 15 S. W. Rep. 188.

Damages Resulting from Proper Construction of Road—Time to which Damages are Confined—Instructions.—In *Chicago & I. C. R. Co. v. Hunter*, (Indiana, May 1, 1891), 27 N. E. Rep. 477, it was held to be proper in condemnation proceedings for the court to refuse to instruct the jury that if the road has not been completed, they should, in estimating damages, only consider such as would naturally result from the proper construction of the road, and such as are confined to the time immediately after the appropriation of the land. The court said: "It may well be said, as an abstract proposition, that the damages proper to be awarded in such cases are only such as will result from a proper construction of the road. The presumption is that the road will be constructed in a proper manner. For injuries resulting from a negligent construction, or from any willful misconduct in its construction, an action will lie, notwithstanding the property has been regularly condemned and compensation awarded. *Pittsburgh, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. St. 445; *Railroad Co. v. Daniel*, 20 Gratt. (Va.) 344. The rule in condemnation proceedings is that all damages, present or prospective, that are the natural or reasonable in-

cident of the improvement to be made or work to be constructed, not including such as may arise from negligence or unskillfulness, or from the wrongful act of those engaged in the work, must be assessed. Damages are assessed once for all, and the measure should be the entire loss sustained by the owner, including in one assessment all injuries resulting from the appropriation. *Elliott, Roads & S.* 199, and cases there cited; *White v. Chicago, St. L. & P. R. Co.*, 122 Ind. 317, 43 Am. & Eng. R. Cas. 156. In instruction numbered 8, tendered by the appellant, and those numbered 2 and 3, tendered by the appellee, the court gave to the jury full and fair instructions relating to the measure of damages. Among other things, the jury were properly instructed that they might consider the manner in which the land was divided by the line of the railroad as affecting the size and shapes of the fields, as affecting the access of stock to water, as affecting the passage of stock from one part of the farm to another, as affecting the possible danger from fire emitted from the locomotives; to which might have been added many other things either annoying or hurtful, necessarily incident to the permanent location and operation of a railroad across one's premises. We think the tendency of the above instructions, numbered 10 and 11, if given to the jury, would have been to confuse, if not mislead them. The rule indicated, when addressed to a jury for their guidance, is too narrow, and, in our judgment, the court did not err in refusing to give them."

Improper Construction of Road or Negligent Management not to be Considered.—In assessing damages for the taking of land for railroad purposes, what may or may not happen owing to an improper construction of the railroad, or owing to its negligent operation, are not matters that enter into the question of compensation. *Louisville & N. R. Co. v. Asher*, (Kentucky, Feb. 12, 1891), 15 S. W. Rep. 517.

Constitutional Provision Making Railroads Liable for Consequential Damages—**Previous Charter Contract**—**Exemption from Future General Legislation.**—Neither the charter of the Pennsylvania R. Co., contained in an act of the legislature of Pennsylvania, passed April 13, 1846, (Laws of 1846, No. 262, p. 312), nor the acts supplementary thereto, nor the act of that legislature passed May 16, 1857, (Laws of 1857, No. 579, p. 519), constituted such a contract between the state and the company as exempted the latter from the operation of § 8 of art. 16 of the constitution of Pennsylvania of 1873, requiring that corporations invested with the privilege of taking private property for public use should make compensation for property injured or destroyed by the construction and enlargement of their works, highways, or improvements; nor did such constitutional provision, as applied to the company, in respect to cases afterwards arising, impair the obligation of any contract between it and the state. The company took its original charter subject to the general law of the state, and to such changes as might be made in such general law, and subject to future constitutional provisions and future general legislation, since there was no prior contract with it exempting it from liability to such future general legislation, in respect of the subject matter involved. Exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words. *Pennsylvania R. Co. v. Miller*, 132 U. S. 75. *BLATCHFORD, J.*, said: "The defendant took its original charter subject to the general law of the state, and to such changes as might be made in such general law, and subject to future constitutional provisions or future general legislation, since there was no prior contract with the defendant, exempting it from liability to such future general legislation in respect of the subject matter involved. This principle is well set forth in the opinion of the justices of the supreme

judicial court of Massachusetts, given by them in answer to a question submitted to them by the senate of that commonwealth, in *Re Institution for Savings*, 9 Cush. (Mass.), 604. See, also, *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140; *Branin v. Connecticut & P. R. R. Co.*, 31 Vt. 214; *Frankford & P. R. R. Co. v. Philadelphia*, 58 Pa. St. 119; *Baltimore & S. R. Co. v. Nesbit*, 10 How. (U. S.), 395, 399, 400; *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.), 166; *Cairo & F. R. Co. v. Hecht*, 95 U. S. 168, 170; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 32, 33; *Newton v. Commissioners of Mahoning Co.*, 100 U. S. 548, 557; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557; 1 Hare, Const. Law, 609, 610; 2 Mor. Priv. Corp. (2d Ed.) §§ 1062, 1065, 1067; *Cooley Const. Lim.* (4th Ed.) *574, 716. The provision contained in the constitution of 1873 was merely a restraint upon the future exercise by the defendant of the right of eminent domain imparted to it by the state. By its terms, it imposes a restraint only upon corporations and individuals invested with the privilege of taking private property for public use, and extends the right to compensation, previously existing, for property taken, to compensation for property injured or destroyed by the construction or enlargement of works, highways, or improvements, made or constructed by such corporations or individuals. Such provision is eminently just, and is intended for the protection of the citizen, the value of whose property may be as effectually destroyed as if it were in fact taken and occupied. The imposition of such a liability is of the same purport as the imposition of a liability for damages for injuries causing death, which result from negligence, upon corporations which had not been previously subjected by their charters to such liability. *Boston. C. & M. R. Co. v. State*, 32 N. H. 215; *Southwestern R. Co. v. Paulk*, 24 Ga. 356, 7 Am. & Eng. R. Cas. 1; *Duncan v. Pennsylvania R. Co.*, 94 Pa. St. 435; *Georgia R. & Banking Co. v. Smith*, 128 U. S. 174, 35 Am. & Eng. R. Cas. 511; *Cooley, Const. Lim.* (4th Ed.) *581, 724; 1 Hare, Const. Law, 421. Nor will the exemption claimed from future general legislation, either by a constitutional provision or by an act of the legislature, be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words. In the present case, the statutory provisions existing prior to the constitution of 1873 in favor of the defendant cannot be properly interpreted so as to hold that the state parted with its prerogative of imposing the liability in question in regard to future transactions. *Providence Bank v. Billings*, 4 Pet. (U. S.), 514; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Christ Church v. Philadelphia*, 24 How. (U. S.), 300; *Gilman v. City of Sheboygan*, 2 Black (U. S.), 510; *Tucker v. Ferguson*, 22 Wall. (U. S.), 527; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Newton v. Commissioners of Mahoning Co.*, 100 U. S. 548, 561; 2 Hare, Const. Law, 661, 663, 664."

Diminution of Damages by Deduction of Benefits.—In *Interstate Consolidated Rapid Transit R. Co. v. Simpson*, (Kan., April 11, 1891), 26 Pac. Rep. 393, it was held that where a right of way for a railroad is condemned through a tract of land, the owner's damages cannot be diminished by any benefits likely to accrue from the construction of the railroad to that portion of the tract not taken. Following *Leroy & W. R. Co. v. Ross*, 40 Kan. 598, 36 Am. & Eng. R. Cas. 653.

In *Colorado* it is provided by statute (Civ. Code, § 253), that the value of benefits shall be deducted from the amount of damages. *Held*, that in proceedings to condemn a right of way for a railroad it is error to withdraw from the jury evidence as to benefits to the property from the proposed railroad. *Colorado Cent. R. Co. v. Humphreys*, (Colorado, March 6, 1891), 26 Pac. Rep. 165.

Excessive Damages—When Award of Jury or Commissioners will be set aside.—A railroad company condemned a strip of land 3160 feet long and 100 feet wide, through an 18 acre tract. On the land stood a dwelling that cost about \$1000, a barn that cost about \$400, and other outbuildings, and an orchard that was not old enough to bear fruit. The road ran within 30 feet of the dwelling. The jury awarded a verdict of \$3000. Many of the witnesses fixed the value of the whole land with the improvements at less than this sum. *Held*, that the verdict was excessive and the award should be set aside. *Louisville & N. R. Co. v. Asher*, (Kentucky, Feb. 12, 1891), 15 S. W. Rep. 517.

On the trial of a petition by a railroad company to condemn a right of way, the evidence was conflicting. The jury viewed the premises, and then rendered a verdict assessing the damages which was larger than the estimates of some of the witnesses, and smaller than those of the others. It did not appear that the verdict was against the clear preponderance of the evidence. *Held*, that it would not be disturbed on appeal as excessive. *Chicago, P. & St. L. R. Co. v. Wolf*, (Illinois, March 31, 1891), 27 N. E. Rep. 78.

In *Street v. New Orleans, Ft. J. & G. I. R. Co.*, (Louisiana, Jan. 5, 1891), 9 So. Rep. 15, the court awarded damages to the amount of \$400 for the appropriation by a railroad company for 11 acres of land, wood destroyed, and fencing required by plaintiff's property having been divided in the construction of the road.

When a trial court in an action to recover damages for the condemnation of a right of way taken for public use, arbitrarily reduces the amount of the verdict rendered by a jury from \$3,227.08 to \$2,589, and the record assigns no reason for such a reduction, and the record shows the jury adopted the highest and most extreme estimate of value, depreciation, and damage in the verdict returned, such judgment will be reversed, and a new trial granted. *Parsons & P. R. Co. v. Montgomery*, (Kansas, April 11, 1891), 26 Pac. Rep. 403.

On appeal from a verdict of a jury in condemnation proceedings, where the court cannot say that the verdict was influenced by passion or prejudice, it will not disturb it. *Louisville & N. R. Co. v. Ingram*, Kentucky, Oct. 14, 1890), 14 S. W. Rep. 534.

The assessment of damages is peculiarly the province of the jury, and where there is a motion to set aside a verdict, because of excessive or inadequate damages, the court must not encroach upon such province of the jury, save in strong cases of injustice. No mere difference of opinion, however decided, justifies an interference with the verdict for this cause, but the amount must be so out of the way as to evince passion, prejudice, partiality, or corruption in the jury. *Battrell v. Ohio River R. Co.*, 34 W. Va. 232.

In a proceeding under Act Miss., March 16, 1886, to condemn a right of way for a telegraph and telephone company over a railroad right of way, witnesses for petitioners stated that the land to be occupied by the posts was worth from \$2.50 to \$3 per mile, while experts for defendant said it was worth to the telegraph company \$100 per mile. The commissioners fixed the amount at \$40 per mile. *Held* that, since it did not appear that "the commissioners acted upon testimony that was irrelevant or incompetent, and that their award was contrary to law, * * * and that injustice had been done," the award would not be disturbed. *Postal Telegraph Cable Co. v. Alabama & V. R. Co.*, (Mississippi, Nov. 24, 1890), 8 So. Rep. 375.

In condemnation proceedings the jury are judges of law and facts, and their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge from a view of the premises, and their experience as freeholders, as much as the testimony of witnesses

to matters of opinion; and appellate courts should not interfere, unless the errors complained of are such as may fairly be said to have had a controlling influence in securing the result. While, under the statute, the supreme court may, upon appeal, set aside an award of the jury in condemnation proceedings, and order a new appraisal, this should only be done where it is clear that the award is against the evidence. *Fort Street Union Depot Co. v. Jones*, 83 Mich. 415.

In an action against a railroad company to recover damages caused by the construction of a railway on a public road immediately in front of the plaintiff's residence, the grade being between eight and nine feet in height, and access to the property obstructed, and the value thereof diminished, the evidence showed that the property was thereby greatly diminished in value, and that the jury had based their verdict on the lowest estimates of the witnesses. *Held*, that the verdict would not be set aside. *Nebraska & C. R. Co. v. Scott*, (Nebraska, March 17, 1891), 48 N. W. Rep. 390.

CITY OF KANSAS

v.

KANSAS CITY BELT R. CO.

(102 Missouri, 633.)

Eminent Domain—Railroad Track Over Street—Widening Street—Damages to be Allowed Railroad.—A railroad company built its track over a street under an ordinance requiring it to erect and maintain a suitable bridge, so as to allow the use of the full width of the street. Such ordinance made no provision concerning the bridge in case the street should be widened. Subsequently the street was widened, the city taking property on each side from the railroad for that purpose. *Held*, that the expenses of removing embankments and adjusting the bridge to the street as widened, are proper elements of damage to be allowed the railroad company.

APPEAL from Jackson Circuit Court.

Pratt, Ferry & Hagerman, for appellant.

R. L. Yeager, and *Frank Dexter*, for respondent.

BLACK, J.—This was a proceeding instituted by the city of Kansas to widen Vine street, formerly designated "Henry Street," so as to make it 70 instead of 50 feet in width. Vine street runs north and south, and is crossed by Twentieth street, which runs east and west. The defendant owns and operates a railroad, which runs east and west on and along Twentieth street. At the crossing of these two streets, the defendant owns property on the north side of Twentieth street, which extends up to the lines of Vine, and which is used as right of way in addition to Twentieth street. The railroad is carried over Vine street by a bridge, which was erected under the terms of the ordinance hereafter mentioned. Damages were allowed the defendant for the land

Case stated.

taken in widening the street, but no damages were allowed to compensate it for reconstructing the bridge, so as to make it conform to the street as widened; hence this appeal. By an ordinance approved in 1882, and which was accepted by the defendant, the defendant acquired the right to build a double track railroad from the eastern to the western part of the city across and along designated streets. This ordinance provides that the railroad shall cross certain streets at the surface thereof, and others by carrying the street roadway over the railroad, and in other instances the railroad must be carried over the streets by means of bridges. The ordinance gives the defendant the right to construct its road on and along Twentieth street where that street crosses Vine street. Section 4 provides: "Where said Henry street, Charlie street, and Forest avenue pass under said railroad, as above mentioned, said Kansas City Belt Railway Company shall erect and maintain suitable bridges, viaducts, or trestles of wood, iron, or stone, so as to allow of the use of the full width of said Henry street, Charlie street, and Forest avenue, excepting only such parts thereof as may be required for posts, columns, or masonry piers, to support the track: provided, such posts, columns, or masonry piers shall be set in rows parallel to the line of the street or avenue crossed: and provided further, that there shall not be more than three rows or tiers of supports on any one street or avenue—one at the center, and one at or just inside each sidewalk, and next to curb line, so as not to interfere with surface gutters: and provided further, that the total width of all such posts, columns, or piers in any one street or avenue, measured across the street or avenue, shall not exceed one-tenth of the total width of the street over which the railroad runs: and provided further, that the said bridges, viaducts, or trestles shall be so constructed as to leave a clear headway of not less than fourteen (14) feet from the level of the grade of any of said streets to the under side of any bridge, viaduct, or trestle." Defendant offered the following proof: "That in pursuance of the terms of said ordinance, the said defendant, the Kansas City Belt Railway Company, entered upon Twentieth street and constructed its two railway tracks along the same. That the grade of the tracks of said railway is about sixteen (16) feet above the present established grade of the street, and said tracks are carried across Vine street by a trestle, or bridge. That, in order to construct its bridge, it was necessary to make the same fifty (50) feet in length, in order to conform to the established width of Vine street, and it was necessary to raise embankments on each side of Vine street to a considerable height; also to place in position bents or supports in the street at the ends of the embankments on either

side. That the doing of each part of said work cost a large sum. That, in case Vine street shall be widened, as proposed, the said defendant company would be compelled to remove all the portion of its embankment within the new street lines, and to readjust the supports for its tracks so as to conform with the terms of its franchise, as set out in foregoing ordinance, at a very large cost to itself." This proposed evidence was excluded, on the ground that the defendant had, by the ordinance, assumed the burden of rebuilding its bridge. The record fails to give us any clear understanding of the present condition of Twentieth street. The railroad passes over and along it, and crosses Vine street on the bridge; but whether Twentieth street is open to travel does not appear. From the evidence offered, but excluded by the court, it appears defendant, in building its bridge so as to conform to the ordinance, made and was required to make an embankment in and along Twentieth street, extending up to the lines of Vine street. From this it would appear that the grade of Twentieth street is the same as that of the railroad, both crossing Vine street at an elevation of 16 feet above the grade of the last named street.

The position of the city here is this: That the defendant must alter its bridge, without compensation therefor, so as to conform to the street as widened, because by the ordinance it is made the duty of the defendant to "erect and maintain a suitable" bridge at this crossing, "so as to allow of the use of the full width of said Henry street." In support of this proposition, we are cited to a vast number of cases. They show that by the common law a person who cuts through a highway, though by authority of law, must furnish a suitable crossing. Where a railroad crosses a highway already in existence, the crossing must be made with as little injury as possible to the highway; and the railroad company must erect whatever structures are necessary to the convenience and safety of the crossing. This duty is a continuing one, without any express statutory requirement. Elliott, Roads & S. 599. And this continuing duty is in no manner cut down by charter provisions or statute law allowing the company to construct its road across highways in such manner as to afford and leave the highway in good repair for public use. Chesapeake, O. & S. W. R. Co. v. Dyer Co., 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676. Where the duty of erecting and maintaining a bridge devolves upon the company, it is not enough that the bridge was adequate when first built; for if, by increase of population in the neighborhood, the bridge becomes inadequate, the company must make the necessary alteration to meet the

Duty of railroad crossing a highway.

present needs of the public. *Cooke v. Boston & L. R. Corp.*, 133 Mass. 185, 10 Am. & Eng. R. Cas. 328. The defendant places much reliance upon the well considered case of *State v. St. Paul, M. & M. R. Co.*, 35 Minn. 131. There the charter of the company gave it authority to construct its road upon, along, across, or over any street; but the company was required to put the street "in such condition and state of repair as not to impair or interfere with its free and proper use." The company laid its tracks down on and across the surface of a street. By reason of an increase in the number of tracks and railroad traffic, and the increase of travel on the street, the crossing became unsafe and dangerous. Under these circumstances, and the charter provision before quoted, it was held that it was the duty of the company to provide, at its own expense, some other mode of crossing, as by carrying the street under or over the tracks.

There is no complaint here that the bridge obstructs or interferes with the use of the street below, so that many of the cases cited, some of which have been noticed, do

Expense of reconstructing bridge is an element of damage.

not dispose of the question in hand; nor do these authorities show that a duty on the part of a railroad company to maintain a bridge structure devolves upon it the further duty of reconstructing the bridge, at its own expense, so as to make it conform to the street as subsequently widened by the city by the exercise of the right of eminent domain. When it is sought to open a street or road across a railroad by proceeding to condemn property, the damages are not limited to the land thus appropriated, but include the expenses of building cattle guards, fencing, and such like outlays, entailed upon the company. *Old Colony & F. R. R. Co. v. Inhabitants of County of Plymouth*, 14 Gray (Mass.), 155; *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507. Here the city seeks to widen the street, and in doing this not only appropriates part of the defendant's right of way, but throws upon the company the expense of removing banks of earth, and readjusting the bridge to conform to the new order of things. These expenses thus brought about, on the plainest principles of justice, constitute elements of damages to be allowed the company in the proceedings to condemn property; for the bridge structure is property as much as the land on which it rests. If the city is relieved from the payment of these expenses, it is because the defendant, in accepting the ordinance, agreed to change and alter its bridge from time to time so as to conform to the street as it might thereafter be widened. We find no such an undertaking in the ordinance. It was passed and accepted in view of the then established width of the street,

and it makes no provision concerning this bridge in case the street should be widened. As there is no agreement on the part of the company to readjust the bridge, at its own expense, to conform to the street as widened, and as no rule of law casts that expense upon the company because of its duty to maintain the bridge, it follows that the expenses of removing the embankment and adjusting the bridge to the street as widened are proper elements of damages to be allowed the defendant. The judgment is therefore reversed, and the cause remanded. All concur.

Laying out Highway Across Railroad Track—Damages to Which Company is Entitled.—See *State ex rel. Chicago, M. & St. P. R. Co. v. Shardlow* (Minn.), 45 Am. & Eng. R. Cas. 106; *State v. District Court* (Minn.), 42 *Id.* 247, note 247; *State v. Chicago, B. & Q. R. Co.* (Neb.), 42 *Id.* 248, note 253.

LAND

v.

WILMINGTON & WELDON R. Co.

(*North Carolina Supreme Court, November 6, 1890.*)

Eminent Domain—Limitation of Action to have Damages Assessed.—A petition by a land owner to have damages assessed against a railroad company which has constructed its road over his land, and the charter of which provides that when it has appropriated land without authority, no action shall be brought by the owner except a petition to have his damages assessed, for the bringing of which no time is limited by such charter, is neither an action of trespass, nor one on a liability created by statute, within § 155, Code Civ. Proc. N. Car., limiting such actions to three years.

APPEAL from Superior Court, Nash County.

Don Gilliam, for appellant.

Bunn & Battle, for appellee.

SHEPHERD, J.—The defendant entered upon the land of the petitioner, and constructed its road in 1886. It has no conveyance of the land, nor has it acquired any title by lapse of time. Its title, therefore, must be derived from the provisions of its charter, and this does not provide for the vesting of title in the defendant until, either at its instance (§ 14 of its charter, Rev. St.) or that of the petitioner, (§ 18, *Id.*) the damages have been assessed and paid. This is also true of the general railroad act, (chapter 49, Code,) the privileges of which are extended to existing railroad corporations. Code, § 1982. No such proceedings were instituted by either party until the petitioner filed this petition

Case stated.

on the 15th of February, 1890. Unlike the charter of the North Carolina Railroad Company, (§ 29,) there is no time prescribed in the charter of the defendant, nor in the general railroad act, in which the owner is to be barred of his right of entry or compensation. It must follow, then, that the defendant is occupying the land of the petitioner without any legal title, and that, in the absence of any statutory provision to the contrary, the petitioner could sue in trespass or in ejectment. The possession of the defendant, however, is protected by a provision of its charter to the effect that where the defendant has entered without any legal proceedings, no action of trespass, or of any other character, shall be brought by the owner, except a petition to have his damages assessed. This takes away all damages for the precedent trespass, and confines the owner to the compensation provided by the statute. These extraordinary privileges which have been conferred upon the defendant ought to be sufficient, it would seem, to meet all the reasonable demands incident to the construction of its road. But it is insisted that, while it may oc-

**Land owner's
action not
barred by
three years'
limitation.**

cupy the owner's land, and acquire title by an adverse possession of 20 years, the owner is powerless to prosecute his only remaining remedy, except within the first three years of that period. We cannot believe that such an anomalous state of affairs was contemplated by the legislature. The defendant could have acquired title by instituting proceedings under its charter, but this it has failed to do, and it would be only following the dictates of common justice to allow the owner his compensation (not damages for the trespass) at any time before the possession of the defendant has ripened into an indefeasible title. In other words, so long as the defendant is content to occupy the land without title, the owner should not be prevented from pursuing his single remedy. In the absence of any legislation in the charter, or in the general railroad act, the defendant relies upon § 155, subds. 2, 3, Code Civil Proc. Pierce, in his work on Railroads, 192, says that such special remedies are not ordinarily barred by the general statutes of limitation, but that this is usually done "by some express provision in the statute which creates the remedy." Conceding, however, that the general statute applies, we are of the opinion that the present proceeding is not embraced in any of its provisions. Subdivision 3 relates only to actions of trespass, which we have seen cannot be maintained at all against the defendant. Apart from this, however, trespass is not the true character of this proceeding. In support of this view, we have a case directly in point, from Pennsylvania, (*McClinton v. Pittsburgh, Ft. W. & C. R. Co.*,

66 Pa. St. 404,) in which it is held that "the petition properly used is not for the recovery of past damages under an unlawful entry, but for compensation for a right to be invested in the company. Though the latter is often denominated 'damages,' its subject is essentially different from the former. It is called 'damages' only in the sense of an unliquidated demand. But in its nature it is the price of a purchased privilege. On the contrary, the claim for the tortious entry and illegal user of the land is purely and properly damages. It is obvious, therefore, that the statute of limitations is not applicable to the petition, which does not determine, unless by consent of the parties, the former damages for intrusion, but compensation only for the future use." The other provision relied upon (subdivision 2) refers to actions "upon a liability created by statute other than a penalty or forfeiture." We are unable to understand how the liability incurred by the interruption of an owner's constitutional right to occupy and enjoy his property, can be said to be created by any statute. It is true that, under the defendant's charter, the petitioner is shorn of all of the usual privileges of ownership, save only a right to have compensation by a particular method of procedure. This right to compensation is conferred by the constitution, and the liability of the defendant is not created, but only regulated, by statute. The language of the provision mentioned is contained in the Codes of several states, and we have been unable to find any decision applying it to cases like ours. It means precisely what it says,—“a liability created by statute,” such as “an assessment for the reclamation of swamps and overflowed lands,” (*People v. Hulbert*, 71 Cal. 72,) or the claims of a district attorney for his commissions on debts recovered for the county, where the statute provides for his payment, (*Higby v. Calaveras Co.*, 18 Cal. 176,) and like cases. These references serve to illustrate the meaning of the words of the statute, and very clearly indicate that they do not embrace a mere regulation for the enforcement of a right secured by the fundamental law of the land. In conclusion, we will add the remarks of Chief Justice THOMPSON in Delaware, *L. & W. R. Co. v. Burson*, 61 Pa. St. 378, that “the defendant has no right to complain of delay as a reason for invoking the statute. The company might and ought to have proceeded, and had the damages assessed and paid them, if it did not intend that the plaintiff * * * might take his time to test the damage, inconvenience, or otherwise, that the road would be to his property before proceeding.” The petitioner is entitled to the relief prayed for.

Affirmed.

Eminent Domain—Limitation of Actions to Recover Compensation.—See *Midland R. Co. v. Smith* (Ind.), 44 Am. & Eng. R. Cas. 222; *Lyles v. Texas & N. O. R. Co.* (Tex.), 39 *Id.* 59, note 60.

Limitation of Action to Recover Damages to Land not taken where the Railroad has been Constructed.—In trespass to try title to a strip of land, which for more than two years has been occupied by a railroad track, where the company by cross bill seeks condemnation of the right of way, the right of the land owner to compensation for the injury to the land not taken is not barred by Rev. St. Tex. 1879, art. 3203, limiting to two years action of trespass for injuries done to the estate or the property of another. *Texas W. R. Co. v. Cave*, (Texas, March 6, 1891), 15 S. W. Rep. 786.

COLORADO MIDLAND R. Co.

v.

BROWN et al.

(*Colorado Supreme Court, Nov. 19, 1890.*)

Eminent Domain—Measure of Damages for Land Taken.—In proceedings under the act of eminent domain in this state, the proper measure of the owner's recovery is: (1) compensation for the land or property actually taken equal to the true and actual value thereof at the time of the appraisal; (2) damages to the residue of the land or property equal to the actual diminution of its market value, if any, for any use to which the same may reasonably be put.

Evidence Admissible on Question of Damages and Value.—In arriving at the value of the property taken, and the damages, if any, to the residue, all evidence having a bearing upon the compensation and damages to be awarded is admissible. With proper instructions from the court we must presume that the jury do not draw improper inferences from competent evidence.

Damages to Residue of Premises—Declaration of Intention to Repair Damage.—It would be an unsafe rule to prevent the owner from recovering the actual damages done to the residue of his premises by the mere declaration of a witness that it was the intention of the party doing the injury to repair the damage at some future time.

Evidence as to Damages—Admission Without Objection.—Where evidence in relation to certain damage is admitted without objection or exception at the trial, the propriety of including such damage, if any, in the assessment, cannot be questioned on appeal.

APPEAL from District Court, Pitkin county.

Appeal from a judgment awarding compensation and damages to appellees for a strip of land through their premises taken for right of way for appellant's railroad.

H. T. Rogers, A. E. Pattison, and Wilson & Stimson, for appellant.

C. W. Franklin, for appellees.

ELLIOTT, J.—The assignments of error are very numerous,

but counsel in their printed argument have very considerably abandoned most of them. This practice is to be commended. In the hurry of a trial at *nisi prius* many exceptions are often taken which counsel find are of no avail when they come to prepare briefs for the appellate court. By frankly withdrawing all assignments except such as are seriously relied on, counsel save themselves and the court of review much unnecessary labor, and secure attention more readily to the important matters involved in the record. It is often hard to find a kernel of wheat in a bushel of chaff. The matters discussed in the brief of counsel relate solely to the admission and rejection of evidence. From the evidence it appears that the premises through which appellant sought to condemn a right of way were situated on the Roaring Fork river, and were occupied and used by appellees for a planing mill and lumber yard, and that it was necessary to keep large quantities of lumber stored upon the premises. The location was peculiarly available and valuable as a mill-site on account of its water power, which could be used for operating different kinds of machinery. Appellees were permitted to show the market value of the water power, and its adaptability to the operation of mining machinery and electric motors in and about the city of Aspen, although such uses had not been actually arranged for at the time. They were also allowed to show the cost of making certain changes in the flume which it was claimed would be rendered necessary by the construction of the railroad at the place designated, and also to show the loss which would be thereby occasioned to the water power. Evidence was also admitted showing the quantity and value of the lumber stored on the premises, and the cost of removing the same to a place less exposed to the increased danger from fire which the construction and operation of the railroad would occasion. To the admission of these several matters of evidence objections were interposed by counsel for appellant on the ground that the same were entirely speculative, and furnished no proper criterion for the assessment of compensation and damages.

Assignments
of error.

Statement of
case.

In proceedings under the act of eminent domain in this state, the owner's recovery is not limited to the value of the property for the special use to which it is devoted at the time of the taking or trial, nor to any particular use. The value of property must necessarily be a matter of opinion, and is, therefore, always somewhat speculative. The proper measure of the owner's recovery is: (1) Compensation for the land or prop.

Landowner's
measure of
damages.

erty actually taken equal to the true and actual value thereof at the time of the appraisalment. (2) Damages to the residue of the land or property not taken, equal to the actual diminution of its market value, if any, for any use to which the same may reasonably be put; and in determining such damages the use to which the property taken is subjected, and the loss and inconvenience thereby occasioned, may be taken into consideration, as the construction and operation of a railroad. Eminent Domain Act, (approved February 12, 1877), § 17; City of Denver v. Bayer, 7 Colo. 113, 2 Am. & Eng. Corp. Cas. 465; Colorado Cent. R. Co. v. Allen, 13 Colo. 229, 44 Am. & Eng. R. Cas. 193; Lewis, Em. Dom. §§ 478-487; Pittsburgh, V. & C. R. Co. v. Vance, 115 Pa. St. 331; Johnson v. Freeport & M. R. R. Co., 111 Ill. 413, 25 Am. & Eng. R. Cas. 192; Weyer v. Chicago, W. & N. R. Co., 68 Wis. 180.¹ From the foregoing rules and decisions it will be observed that in arriving at the value of the property taken, and the

Damages to
residue not
taken—Evi-
dence.

damages, if any, to the residue, a wide range of evidence is admissible. It must be conceded that the matters admitted in evidence on the trial of this case, as above stated, have some bearing upon the compensation and damages to be awarded by the jury, though, without proper instructions from the court, the jury might be misled by such evidence. But as counsel do not urge in argument anything against the charge, and as upon examination the instructions appear to be full and fair, we must presume that the jury did not draw improper inferences from the evidence.

It was shown in evidence in behalf of appellees that appellant, while constructing its roadbed, rolled or deposited certain large boulders upon the land of appellees, some of them so large that it took six mules to move them out of the excavation. The amount of appellees' land covered by the deposit of the boulders is not shown in the record, though it was

Declaration
of intention
to repair
damages.

pointed out on the map at the trial. On the part of appellant, one witness testified that these boulders were deposited outside "temporarily, waiting for the track to be laid in order to take them off." The withdrawal of this latter testimony from the jury on motion of appellees is assigned for error. It would be an unsafe rule to prevent the owner from recovering the actual damages done to the residue of his premises by the mere declaration of a witness that it was the intention of the party doing the injury to repair the damage at some future time. No injustice was done by striking out this testimony. It was not shown nor offered to be shown that the boulders were ever removed by appellant;

and, if appellees are allowed to recover for such damage, appellant cannot be required to remove the boulders. *Dorlan v. East Brandywine R. Co.*, 46 Pa. St. 520.

It has been suggested, though not in the briefs of counsel, that the damage occasioned by depositing the boulders upon the lands of appellees is not recoverable in a proceeding of this kind on the ground that such damage cannot be reasonably foreseen or anticipated as a consequence from the construction or operation of the railroad. *Water Co. v. Middaugh*, 12 Colo. 438, 29 Am. & Eng. Corp. Cas. 358. Undoubtedly, if the trial and assessment of damages in the proceeding had taken place before the construction of the road, and the boulders had afterwards been thrown upon the land, appellees would not have been precluded from maintaining an independent suit for the trespass. But, as the damage was thus occasioned before the trial, it is not so clear that appellees must resort to a separate action therefor. It is unnecessary, however, to determine this question, for the evidence in relation to the boulders having been admitted in behalf of appellees in the court below, without objection or exception, the propriety of including such damage, if any, in the assessment, cannot be questioned on this appeal. Counsel doubtless desired that whatever liabilities appellant was responsible for should be settled in one suit, and so did not raise the question above suggested. The judgment of the district court is affirmed.

Admission of evidence without objection—Appellant.

Measure of Damages for Taking Land—Difference in Values—What Values are to be Considered.—The true test of damages for the taking of land for railroad purposes, is the difference between the value of the entire lot as it was just before the taking, and the value of what is left after the taking. The value of the lot at the time of the taking is the value as it was, and not as it might have been with improvements, although the availability of the land for these is an element in its value as it is. And the value of the rest of the lot after the taking is also its value as it then is, not as it is when improved. The both values before and after the taking are the general market values of the particular lot, considering such advantages and disadvantages as are special and peculiar to it, without reference to the general rise and fall, common to it with other property in the neighborhood, consequent on the coming of the railroad. *Harris v. Schuylkill River E. S. R. Co.*, (Pennsylvania, April 6, 1891), 21 Atl. Rep. 590.

In Kentucky, the rule in condemnation proceedings is to ascertain the value of the entire tract through which the road is to run, and then find the value of the whole tract after the appropriation of the strip necessary for the road; and the difference is the compensation to which the owner is entitled, excluding all enhancement in value resulting from the proposed improvement. *Louisville & N. R. Co. v. Ingram*, (Kentucky, Oct. 14, 1890), 14 S. W. Rep. 534.

Where a railroad company condemns a right of way through a tract of land, the measure of damages is the value of the land taken, together with

the difference on the day of the assessment of the damages, between the value of the land not taken with the railroad constructed through the tract, and its value, without the railroad, no regard being had to any enhancement in value by reason of the construction of the road. *Louisville & N. R. Co. v. Asher*, (Kentucky, Feb. 12, 1891), 15 S. W. Rep. 517.

In Illinois, where land is condemned for railroad purposes, in proving the damage to that part of the land not taken, the measure of such damages is the difference in the market value of the land before and after the construction of the road. *Chicago, P. & St. L. R. Co. v. Eaton*, (Illinois, Jan. 24, 1891), 26 N. E. Rep. 575.

Rental Value of Land as the Measure of Damages—Instructions.—In *Baltimore & O. R. Co. v. Boyd*, (Maryland, Dec. 5, 1890), 20 Atl. Rep. 902, it appeared that the appellees owned a small parcel of land, a portion of which was occupied by appellant for the construction of its railroad tracks. For this occupancy, which was not accompanied by any act indicating wantonness or malice, actions were brought covering different periods of time. The court instructed the jury, that reasonable damages for the occupation of the land would be the fair rental value of the ground during the time, and for the purpose it was occupied. The court further instructed the jury not to include in their assessment damages for the original construction of the roadbed, nor damages for the fee simple value of the land, nor to consider the peculiar value of the land to the railroad company, nor its necessity as a part of its line, nor the profits derived from its use. *Held*, that the instruction could not be considered as misleading. *Held*, also, that in such case the damages could not be confined to the rental value of the land at market rates to other parties.

Right of Purchaser of Land to Compensation Subsequent to its Occupation by a Railroad but before Condemnation.—One who purchases, subsequent to the occupation of a railroad, land which it entered upon without consent of the owner, and which had not been condemned to its use, is entitled on condemnation to the same compensation that the owner could have recovered had he continued in ownership. *San Antonio & A. P. R. Co. v. Ruby*, (Texas Sup. Ct. March 10, 1891), 15 S. W. Rep. 1040.

Damages Resulting from Overflow—Amendment of Articles to show that Overflow would be Prevented—Finding of Jury—Instructions.—In *Chicago, & I. C. R. Co. v. Hunter*, (Indiana, May 1, 1891), 27 N. E. Rep. 477, which was a proceeding by a railroad company to take certain land for a right of way, the landowner claimed that he would be permanently damaged by the overflow of water on his land caused by the construction of the railroad; but the jury found that he would not be so damaged. *Held*, that the refusal of the court to allow the company after the trial had begun to amend the articles of its incorporation so as to show that it agreed to construct such an embankment as would prevent any overflow, was not prejudicial error. And the action of the court in giving and refusing instructions in regard to damages growing out of such alleged overflow was not assignable as error, since it could not have damaged the plaintiff.

View by Jury of Land Taken—Instruction to Estimate Damages from the Evidence.—Where, upon the trial of an issue to assess damages to land arising from the construction of a railroad, the jury empaneled are sent to view the land, the purpose of the view is to enable them the better to understand the testimony, and not that they should make up their verdict from the view in disregard of the evidence adduced. *Flower v. Baltimore & P. R. Co.*, 132 Pa. St. 524.

Interest on Damages.—Where it appears in proceedings to condemn land, and for damages assessed, that the railroad company has been in the enjoyment of the land, the damages assessed will bear interest from the time of the filing of the petition. *Newgass v. St. Louis, A. & T. R. Co.*, (Arkansas, Jan. 17, 1891), 15 S. W. Rep. 188.

LOUISVILLE, ST. LOUIS & TEXAS R. CO.

v.

BARRETT *et al.**(Kentucky Court of Appeals, April 18, 1891.)*

Eminent Domain—Misconduct of Commissioners—Discussion of Case With One Party.—In proceedings to take land for railroad purposes, it appeared that a person who was the guardian of one of the landowner's and agent of another, went upon the land with the commissioners, the other side not being represented, and pointed out the route of the proposed road, and the damage that would be done by its construction. *Held*, that a motion to quash the report of the commissioners should be denied, where it appeared that there had been two jury trials and verdicts for the defendants, without reference to the report of the commissioners, and the appeal is taken from judgment upon the last verdict.

Same—Damages—Giving Double Damages for the Same Thing—Instructions.—In a condemnation suit, the jury were instructed that in fixing the amount of the direct damages, they should not only consider the value of the land taken, considering its relation to the entire tract, but also the injuries, if any, directly resulting from the taking to the remainder of the tract; the injuries contemplated being those which depreciate the value of the land by reason of the shape in which it may be left, the easements impaired or destroyed, and any such additional improvements, if any, as may be necessary to its reasonable enjoyment; such injuries to be considered, however, only so far as they depreciated the value of the land; the finding for direct damages not to exceed the difference in the actual value of the land immediately before and after the appropriation. *Held*, that the jury were not authorized by these instructions to find damages twice for the same thing, viz.: to give the value of the strip taken considering its relation to the balance of the tract, and also damages on account of the awkward shape into which the land left must be thrown.

Same—Damages for the Cost of Fencing.—It is proper for the jury, in assessing damages for a right of way appropriated for a railroad, to include in their verdict damages for the cost of fencing, where it is provided by statute (Gen. St. Ky. p. 759) that where a railroad has been built ten years, owning its right of way, and is operated and assessed for taxes, it must erect and maintain division fences equally with other landowners, but that the provision of the act shall not apply where it has condemned its right of way and paid the vendor damages, in which the cost of fencing was considered and allowed.

APPEAL from Daviess Circuit Court.

Helm & Bruce, for appellant.

Sweeney, Ellis & Sweeney, for appellees.

HOLT, C. J.—In this proceeding to condemn a right of way through the land of the appellees a total damage of \$7,914.20 was allowed by the commissioners appointed by the county court. Exceptions having been filed, a trial by jury resulted

in a finding of \$7,447.75 in that court. Upon an appeal by the appellant to the circuit court a verdict for \$6,000 was rendered, it being recited in it: "This includes fencing." The appellant now complains of it, contending, first, that its motion made in the circuit court to quash the report of the commissioners should have been sustained; the ground being that the person who is the guardian of one of the appellees and agent of the other went upon the land with the commissioners, the other side not being represented, and pointed out the route of the proposed railroad, and the damages that would be done to the land by its construction. One of the parties to such a controversy should never be allowed to discuss its merits privately with the commissioners in the absence of the other party. Such *ex parte* communications are improper. It is, however, unnecessary to determine the effect of such conduct upon their report, because, while it is at least in part the foundation of the proceeding, yet we fail to see how the appellant can now claim to have been prejudiced by it. The jury in the county court fixed the damages independently of it. A second one did the same in the circuit court, and this appeal is from the judgment upon this last verdict.

The jury were told that in fixing the amount of the direct damages they should not only consider the value of the land taken, considering its relation to the entire tract, but also the injuries, if any, directly resulting from the taking to the remainder of the tract; the injuries contemplated being those which depreciate the value of the land by reason of the shape in which it may be left, the easements impaired or destroyed, and such additional improvements, if any, as may be necessary to its reasonable enjoyment; such injuries to be considered, however, only so far as they depreciated the value of the land; the finding for direct damages not to exceed the difference in the actual value of the land immediately before and after the appropriation. They were also further instructed as incidental damages and advantages arising to the land from the operation of the road. It is contended that they were authorized under these instructions to find damages twice for the same thing, to-wit, to give the value of the strip of land taken, considering its relation to the balance of the tract, and also damages on account of the awkward shape into which the land left might be thrown, and that the former includes the latter. Undoubtedly one cannot recover twice for the same thing, but this the party does not do when he is allowed the value of the land taken, considering its relation to the remainder of the tract, and also damages by reason of the de-

Misconduct of
commissioners.

Instructions—
Assessment of
double dam-
ages.

preciation of the balance of the land by reason of the shape in which it may be left. This merely means that he is to have for the land taken what it is worth as it is situated, or as a part of the whole tract; and in no other way can he be fairly compensated. In addition to this, if the balance of the land has depreciated in value by being left in bad shape, the loss should be made up to him, or else he is not made whole. Such a diminution in value is as much a taking, in constitutional meaning, as the use of the roadbed by the company. Our constitution provides that no man's property shall be taken for public use without just compensation being previously made to him; and this is not done unless he receives not only the value of the land actually taken as it is situated to the balance of the tract, but also the decrease in value of the remainder of the tract arising from a portion of the original tract having been condemned. It was said in the case of *Henderson & N. R. Co. v. Dickerson*, 17 B. Mon. (Ky.), 173: "The constitution secures to the owner of the land just compensation for his property before he can be deprived of it. Its value to him, considering its relative position to his other land, and the other circumstances which may diminish or enhance that value, can alone afford him a just compensation for its loss. To third persons the same quantity of land of equal quality on one of the boundaries of the farm might be of as much value as if it were situated in the middle of the farm, but at the same time its value thus ascertained might be a very inadequate compensation to the owner if the land were taken out of the middle of his farm, so as to separate it into different parts, instead of being taken on one of its boundary lines. The real value of the land to the owner, as it is actually situated, and not merely its value regarding it as a separate and independent piece of land, he has a right to demand, and nothing less can secure him a just compensation for his property." This rule has been reaffirmed by this court in the subsequent cases of *Louisville & N. R. Co. v. Thompson*, 18 B. Mon. (Ky.), 735; *R. Co. v. Helm's Heirs*, 8 Bush (Ky.), 681; and *Asher v. Louisville & N. R. Co.*, 87 Ky. 391. In the last named case it was expressly held that to conform to the constitutional requirement above referred to, and afford the owner just compensation, he must be allowed the value of the land actually taken, considering its relation to the entire tract, and also any direct damage diminishing the value of the balance of the tract arising from the appropriation of a part of the entire tract; and that from the amount so found no deduction could be made for any benefits that might reasonably be expected to accrue from the building and operation of the road. It is also urged that the instruc-

tion, in as far as it authorized the jury to allow for any additional improvements that might be necessary to the reasonable enjoyment of the land left, is erroneous; that this permitted them to find the cost of any fencing that might be necessary to that end as direct damages; and it is contended—*First*, that by reason of the act of the legislature of May 17, 1886, (Gen. St. p. 759,) no damages of any character can be allowed for fencing; that the legislature has prescribed a mode of relief for the landowner, as to fencing, which is exclusive; and, *second*, if this be not so, yet damages arising by reason of the need of additional fencing on account of the taking of a part of the land are consequential, and not direct; that they result, not from the appropriation of the land, but from the operation of the road; and that, being consequential, they are subject to setoff by any advantages arising from building of the road. The act named provides that when a railroad has been built 10 years, and owns lands and right of way, and is in operation and assessed for taxation, it shall be upon equal terms and obligations with other landowners and taxpayers owning adjoining lands in the state; and upon notice, as provided in the act, from the adjacent owner, must erect and maintain a lawful fence on its proportion of the line. Its seventh section says: "That the provisions of this act shall not apply in any case where any company has furnished the material to build a fence, or condemned its right of way, and paid the owner or his vendor damages in which the fencing was taken into consideration in estimating damages; nor be so construed as to require the company to build any fence along its line through any town or city, or across any public or private passway;" and the eleventh section provides: "This act shall not apply to any land where the owner or his vendor has received compensation for fencing said land." This statute expressly recognizes that in a condemnation proceeding damages may be allowed for the fencing, which may be necessary to the enjoyment of the land left. It is unnecessary to consider or construe all of its provisions. It is sufficient that it does not attempt to take away from the landowner his right to compensation for the needed fencing when his land is condemned. The land not taken is diminished in value to that extent; it is in effect *pro tanto* taken; and were his right to compensation in this respect attempted to be taken away, it would be a violation of his constitutional right to compensation before his property can be taken for public use. It is said that the language of the seventh section shows that the act was intended to apply only to cases which had arisen before its enactment, and not to those which might arise in the future. We do not think so,

but that a proper construction makes it relate to the time anterior to that when the company may be required to fence its proportion of the line.

It is earnestly contended that the damage arising from the need of fencing is consequential, and not direct, and therefore subject to be abated by any benefits arising from the building of the road. In the broad sense of the term all of the damage resulting from the taking of the land is consequential. It results from the taking. Our statute applying to condemnations for railroad uses is not so definite in its terms as to the damage to be allowed as that relating to condemnations for public roads. In the latter case it must be "a just compensation * * * for the land proposed to be taken, and the additional fencing which will be thereby rendered necessary, and the damage to the residue of the tract beyond the peculiar benefits which will be derived to such residue from the road." In the former it says: "It shall be the duty of said commissioners to view the land and material, and to award to the owner or owners the value of the land or material taken, which shall be stated separately; and they shall also award the damages, if any, resulting to the adjacent lands of the owner, considering the purposes for which it is taken; but shall deduct from such incidental damages the value, if any, of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed." It is the duty of a court to so construe a legislative act, if it will reasonably admit of it, as to render it constitutional; and the statute relating to the condemnation of land for railroad purposes has uniformly been so construed as to give to the owner the value of the land actually taken, considering its situation to the balance of the tract, and the direct injury to the balance of the tract resulting from the taking, without diminution by the value of any benefits likely to accrue from the construction of the road.

Cost of fencing an element of damages.

If the decrease in value of the balance of the tract by reason of the taking is to be allowed him as direct damage without diminution by reason of any advantage accruing from the building of the road, upon the ground that this is necessary to fulfill the constitutional requirement of just compensation to him, why should not the damage to him arising from the need of necessary fencing be included as a part of it? The need is produced by the taking. The balance of the land is lessened that much in value by the taking, and it is certainly necessary to pay him this damage to make him whole. That much of his property has in effect been taken from him by the condemnation. It is said in *Lewis, Em. Dom.* § 498: "If, in

view of the probable future use of the land, additional fencing will be necessary, of which the jury or commissioners are to judge, and the owner must construct the fence if he has it, then the land is depreciated in proportion to the expense of constructing and maintaining such fencing. Nothing can be allowed for fence as fence. The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it." While the author, referring to the decision of another state, says nothing can be allowed "for fence as fence," yet it seems to us its being so called is immaterial. It is really for the depreciation in value of the land let by the condemnation; and many cases, as the author says, allow the cost of fencing as a specific item. If a portion of the owner's land be taken, and the value fixed at a thousand dollars, but the remainder of the land be left in such shape that he must, in order to its necessary enjoyment, at once pay out a thousand dollars for fencing, it certainly cannot be said that he has received a just compensation for his land, and the constitutional requirement in that respect has been fulfilled. Such expense is, to our minds, a part of the direct damage. It merely fills the place of a value that has been taken from him by the taking of his land. The case of Louisville & N. R. Co. *v.* Glazebrook, 1 Bush, (Ky.) 325, in so far as it conflicts with these views, is overruled. The judgment upon the appeal to the court was more favorable to the appellant than that rendered in the county court. No rule of law was violated or discretion abused by the appellant being allowed its costs in the circuit court. The judgment is therefore affirmed upon both the original and cross appeal.

Eminent Domain—Cost of Fencing Right of Way as an Element of Damages.—See *Curtin v. Nittany Valley R. Co.* (Pa.), 44 Am. & Eng. R. Cas. 130; *Elgin, etc. R. Co. v. Fletcher* (Ill.), 39 *Id.* 120; *Centralia & C. R. Co. v. Brake* (Ill.) 36 *Id.* 638, note 641; *Centralia & C. R. Co. v. Rixman*, 30 *Id.* 336, note 338.

Misconduct of Commissioners, Viewers, Jurors, etc. in Condemnation Proceedings.—Improprieties Generally.—It is a primary rule that commissioners to assess damages in eminent domain proceedings, should be free from prejudice or undue influences. *Marquette, H. & O. R. Co. v. Probate Judge*, 53 Mich. 217, 14 Am. & Eng. R. Cas. 355. They must therefore so conduct themselves during the pendency of the proceedings, as not to subject themselves to such influences, and if they are guilty of any serious impropriety which might affect their decision, it will be set aside. If however the report of the commissioners is set aside, the evidence must show that they acted corruptly under improper bias or prejudice, or were in some way guilty of conduct unbecoming their official position. *Hayward v. Bath*, 40 N. H. 100. Thus the fact that road surveyors were ordered to meet, and did meet at the house of one of the applicants for the road, will not invalidate their acts in the absence of proof of undue influences or improper conduct. *State v. Brands*, 45 N. J. L. 332. But in the case of *New York, W. S. & B. R. Co. v. Townsend*, 36 Hun, (N. Y.) 630, the report of

commissioners to appraise lands to be taken for a railroad was set aside, because the son of one of the commissioners was taken into the employ of the railroad company, before the hearing. The court said: "We do not say that this appointment had any influence on the decision. We do not question the commissioners' integrity; but these proceedings must not be open to suspicion."

It is not illegal for commissioners to assess damages, to agree with the railroad company, whose duty is to pay for their services, upon a just and equitable compensation. The land owner has ground of complaint only when the amount agreed upon is exorbitant, or so large as to create suspicion of corruption. *State v. Dover & R. R. Co.*, 43 N. J. L. 528. And it has been held that there is no impropriety in a highway committee stating to both parties at the close of the hearing that they should not deliver their report to the party in whose favor it should be made, until their fees were paid. Nor is there any impropriety in the counsel for either party stating that, if the report was in favor of the highway, his clients would at once pay their fees. *Williams v. Town of Stonington*, 49 Conn. 229.

In the case of the application of the Staten Island Rapid Transit R. Co., 41 Hun, (N. Y.) 392, a motion to confirm the report of commissioners appointed to appraise the damages to be awarded to the owners of the land taken for railroad purposes was denied and the report was set aside, upon the objection of certain of the property owners that the commissioners had received from the railroad company compensation for their services exceeding that prescribed by the statute. It did not appear that the commissioners required any stipulation in advance respecting their fees, or that there was any agreement on the subject at any time. After their services were completed they made out a bill which was presented to and paid by the company. *Held*, that the court erred in setting aside the report.

Receiving Entertainment from One of the Parties.—The entertainment of a committee to lay out a highway by one of the parties, during the trial, is *prima facie*, irregular and improper. *Greene v. East Haddam*, 51 Conn. 547. Where, however, it appears that there was no public house in the village where the hearing was had, and the petitioners and the selectmen of the respondent town agreed that the committee might be entertained at the private house of one of the petitioners, and that counsel on both sides should be accommodated at the same place, there was held to be nothing illegal or improper in it. And this, although the committee was there handsomely entertained, and were carried to and from the place of hearing by the person entertaining them, and no charge for this service was made by him against the committee or the town. *Beardsley v. Town of Washington*, 39 Conn. 265. If the attentions paid by one of the parties are not actually improper, their conduct will not vitiate the proceedings. *Greene v. East Haddam*, 61 Conn. 547. The fact that a petitioner for the location of a highway, furnished during the proceedings, luncheons to the commissioners, and all others interested, is not a ground for quashing a proceeding, where it is shown that it was a custom of that county that petitioners in such cases should furnish such luncheons. *Blake v. Norfolk Co.*, 114 Mass. 583. And the verdict of a commissioners' jury, assessing damages to land will not be set aside, because a deputy sheriff, having charge of them, while they were deliberating on their verdict at the house of the petitioner where the hearing was had, upon their request for refreshments, furnished a pitcher of cider belonging to, but without the knowledge of the petitioner, if no injury to the respondents was caused thereby. *Tripp v. Bristol Co.*, 2 Allen (Mass.) 556. Nor is it sufficient to set aside the return of freeholders to lay out a public road that the caveators furnished them their dinners. *State v. Justice*, 24 N. J. L. 413. And see *State v. Reckless*, 38 N. J. L. 393.

Where, during a hearing before a committee in a highway case, one of the committee was entertained over night by one of the selectmen in the defendant town, and the counsel for the petitioners knew of the fact, but went on with the hearing the next day and through the trial without making objection, it was held that it was too late to make the objection after an adverse report of the committee. *Williams v. Town of Stonington*, 49 Conn. 229.

But the furnishing of spiritous liquors by the petitioners for a highway, to the county commissioners while engaged in the hearing, of which they repeatedly drank, is an abuse, for which the court will ordinarily set aside a report in favor of such petitioners, without inquiring how far the commissioners were affected by it. *In re Highway in Newport*, 48 N. H. 433.

In Pennsylvania any entertainment or refreshments supplied by a party in interest to road jurors will be regarded as sufficient ground for setting aside the report. *Matter of Magnolia St.*, 8 Phila. (Pa.), 468. But the rule appears to be otherwise, where there is no proof of abuse. *Road in Plymouth*, 5 Rawle (Pa.), 150.

Ex parte Communications with Jurors and Commissioners.—In New Hampshire, it is held that an objection to the conduct of a petitioner and one of the commissioners in viewing together a part of the proposed way before the meeting of the commissioners, is addressed to the discretion of the court below, and the supreme court will not revise the exercise of such discretion in that respect. *Patten's Petition*, 16 N. H. 277. But where it was shown that commissioners have themselves introduced or encouraged conversations or discussions relative to the laying out of a new highway referred to them with one party in the absence of the other, their report will be set aside. And where it is shown that one of the parties has made representations in relation to the highway to one or more of the commissioners in the absence of the other party, or has engaged in conversations or discussions calculated to influence their judgment, a report favorable to such party will be set aside. *Peavey v. Wolfborough*, 37 N. H. 286.

In *Harris v. Woodstock*, 27 Conn. 567, it is held that a committee to whom a highway petition had been referred were guilty of conduct "irregular and improper," where one of the parties, in the absence of the other side, laid before the committee a survey of the land, through which the road was to be run, to which survey was appended certain remarks in regard to the difficulty and expensiveness of the proposed road.

In the case of *In re Buffalo, N. Y. & P. R. Co.*, 32 Hun (N. Y.), 289, the second report of commissioners appointed to appraise damages to be paid for land for railroad purposes was set aside, because of their improper conduct, in going upon the lands to be taken, in company with the landowner and his attorney, and their examining a map proposed by the former and listening to his explanation thereof, in the absence of the agent and company and its attorney, who were then, to the knowledge of the commissioners, on their way to meet the commissioners and view the premises. It also appeared in this case that one of the commissioners rode from a village to the farm to be viewed with, and in a carriage provided by the land owner; that one of them took supper at the latter's house, and was sent home in a carriage provided by him, and that another accepted from the landowner a sum of money for his services and expenses, in excess of the amount allowed by statute, and which was understood to be so at the time.

In proceedings by a city to open a highway, the city is a mere party litigant, and its relations to the jury and those of its attorney should be governed by the particulars which govern the like relations of any other party; accordingly, the provisions of a city charter requiring the city attorney to give the jury, in such a case, legal advice and counsel during their duties, whenever requested, and to draw up their verdict in the form

of a report for their signatures, when they have agreed on it, are a plain violation of the rule requiring jurors to be absolutely free from the influence of any party or the counsel of any party on whose affairs they are to act. *Paul v. Detroit*, 32 Mich. 108.

But the fact that a petitioner, after a hearing before commissioners upon an application for laying out a highway, urged upon them in private the importance of the way, and strove to hasten their action, is not a ground for quashing their proceedings in laying out the way, when it expressly appears that he acted without improper motives, and that the commissioners were not influenced by him. *Blake v. Norfolk Co.*, 114 Mass. 583. Nor will the report of commissioners appointed to appraise damages for land taken for railroad services be set aside for their improper action in receiving, after the submission of the case, and without the knowledge of the landowner, a written statement from the counsel of the railroad, containing certain computations of the value of the premises to be taken, which computation had been made orally by the said counsel, before the commissioners at the hearing. *New York, W. S. & B. R. Co. v. Church*, 31 Hun (N. Y.), 440.

In a case where it was objected that a committee to lay out a highway acted improperly, and were subjected to improper influences, the following facts appeared: The committee during the greater part of the trial boarded at the Champion House, a hotel situated at the southern terminus of the proposed highway. The proprietor of the hotel used in connection with it a small steamboat or yacht, which the committee understood to be kept for the common convenience of all his guests. The place of the hearing was at a lower village on the river, about three quarters of a mile from the hotel, and on some occasions the committee were carried to and from the place of trial on the steamboat, and sometimes went back and forth on foot or by the hotel wagon. On some occasions some of the petitioner's counsel or witnesses were also upon the steamboat, and sat at the same table with the committee at the hotel while dining. On two occasions the hotel proprietor took the committee, with other persons, upon the steamboat for short pleasure sails. One of such pleasure sails was through Salmon Cove and up Salmon River. At this time Augur was present. While on this sail the boat ran aground at a point just above a wharf. This sail was made during a freshet, and the boat was run without reference to the channel of the stream and across the meadows. No allusion was made during this trip to any matter connected with this litigation. This sail was had before the defendants had made the claim now to be stated. The defendants subsequently on the trial claimed that common convenience and necessity did not require the proposed road, and one of the reasons given by them was that the business people of Moodus, at the northern terminus of the road, could be well accommodated by transporting their freights over a water route up Salmon Cove to a wharf and road already built leading to the Moodus; the wharf being the one above referred to. The plaintiff claimed, in reply, that there was difficulty in navigating this cove with vessels of considerable size at an ordinary stage of the water. The defendant's counsel now claims that the pleasure sail and grounding of the boat was a preconcerted plan to influence the committee upon this question; but this claim as matter of fact was not sustained. On one occasion during the trial, in presence of Mr. Woodruff and Mr. Newton, of the committee, others being present, and the remark being heard by Mr. Newton, the wife of the proprietor of the hotel said she did not know anything about the reasons for or against the road, but that she was sure that those who wanted the road had good reasons, and those who opposed it had bad reasons. This remark was not addressed to any member of the committee. When it was made her hus-

band said to her that it was not proper for her to remark about the road in the presence of the members of the committee, and she replied that she must talk or die. Mr. Newton testified that he understood the whole conversation to be in jest, and not intended for serious consideration. After the committee had decided to make the layout, the same lady said in the hearing of Mr. Newton that she should be mad if they did not get the road, but should think more of the committee if they decided as they thought right. During the trial the members of the committee on two or three occasions accepted social invitations to private houses, and on one occasion at the house of D. B. Warner during a game of whist, in which one of them participated, his partner, a young lady, said as they won a game, "I cannot but think we are playing for the road." Her sister immediately said to her, "You know nothing was to be said about the road." It did not appear that the other members heard the remark or knew of its being made. Mr. Warner was a witness for the petitioner, and owned some property near the southern terminus of the road, and favored the proposed layout. No member of the committee did or said anything to invite or encourage any of these remarks, made no reply to them, and did not permit or allow them to be made. The court held that it could not infer as a matter of law from these facts that the committee had been guilty of irregular and improper conduct, which would vitiate their proceedings. *Greene v. Town of East Haddam*, 51 Conn. 547.

CHICAGO, KANSAS & WESTERN R. CO.

v.

DRAKE.

(*Kansas Supreme Court, June 6, 1891.*)

Eminent Domain—Damages—Opinions of Witnesses as to Value.—In an action to determine the value of certain town lots condemned for the right of way of a railroad, the opinions of witnesses, as to the value of the lots at the time they were condemned, will not be deemed conclusive, but the jury may consider such opinions in connection with all the other testimony in the case, and then, for itself, determine from all the testimony the value of such lots.

COMMISSIONERS' decision. Error from District Court, Bourbon County.

Geo. R. Peck, A. A. Hurd, and Robt. Dunlap, for plaintiff in error.

A. A. Harris and Henry E. Harris for defendant in error.

GREEN, C.—The plaintiff in error condemned three lots in block 8 of Carroll's plaza, in the city of Ft. Scott, in Bourbon county for railroad purposes. All the lots were appropriated, and the commissioners awarded as compensation for them \$240. The defendant in error appealed from the award. The case was tried in the district court, and the jury returned a verdict in favor of the owner

of the lots for the sum of \$881.93. A motion for a new trial was overruled, and judgment was entered in accordance with the verdict. The plaintiff in error contends that the jury disregarded the evidence in arriving at their verdict, and that it is contrary to and unsupported by the evidence. Six witnesses testified for the plaintiff, upon the trial in the district court, that the lots were worth \$1,500. Five witnesses, in behalf of the defendant below, fixed the value of the lots at from \$240 to \$375. There was no evidence from any witness fixing the value of the property at the amount returned by the jury. The defendant below requested the court to permit the jury to view the premises, but this request was denied. It is claimed that the verdict is neither in accord with the plaintiff's nor defendant's witnesses, and hence is unsupported by any evidence. It was the particular province of the jury to determine the value of the lots. Their value was purely a question of fact, to be determined from all of the evidence before them. They had the testimony of the witnesses, upon the part of the plaintiff and defendant, giving their opinions as to the value of these lots. There was evidence, too, of the location and condition of the lots, as well as the purpose for which they might be utilized. The testimony as to the value of the property condemned was opinion evidence. The witnesses gave their best judgment as to the value of the lots, and this evidence depended upon a knowledge of the value of real estate at the time the property was taken. Now, an opinion as to the value of a piece of property is not, strictly speaking, a fact, but is received in evidence upon the same principle as that on which the opinions of experts are admitted. In a well considered case, decided by the supreme court of the United States, Mr. Justice FIELD observed: "The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed, and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry." *Head v. Hargrave*, 105 U. S. 45. The same court quotes

Opinions as
to value not
conclusive.

approvingly the case of *Anthony v. Stinson*, 4 Kan. 211, where this court said that the jury were not to be instructed as to what part of the testimony before them should control their verdict; that, in order to control it, the testimony of experts should be of such a character as to outweigh, by its intrinsic force and probability, all conflicting testimony; and that they could not be required to accept, as a matter of law, the conclusions of the witnesses instead of their own. In a recent case this court has said that a court or jury trying the question of the value of legal services is not bound to accept as conclusive the opinions given by attorneys respecting the value of certain services; that such opinions are only to be considered in connection with other testimony in the case, in the light of which and of its own general knowledge the court or jury should, for itself, determine the value. *Bentley v. Brown*, 37 Kan. 14. In *Patterson v. Boston*, 20 Pick. (Mass.), 166, the question was as to the damages to be awarded to the plaintiff for his property taken to widen a street in Boston. The trial court instructed the jury that, in estimating the amount of the damages, if any of them knew, of his own knowledge, any material fact that bore upon the issue, he ought to disclose it, and be sworn, and communicate it to his fellows in open court, in the presence of the parties; but that, in making up their verdict, they might rightfully be influenced by their general knowledge on such subject, as well as by the testimony and opinions of witnesses. The case being taken to the supreme court of the state, it was held that the directions were not open to exception. Said Chief Justice SHAW, speaking for the court: "juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisement, if they might not avail themselves of those powers of their minds when they are most necessary to the performance of their duties." In *Murdock v. Sumner*, 22 Pick. (Mass.), 158, the same court, speaking through the same distinguished judge, said that "the jury very properly exercise their own judgment, and apply their own knowledge and experience, in regard to the general subject of inquiry." In that case a witness had testified as to the quality, condition, and cost of certain goods, and giving his opinion as to their worth; and the court said that "the jury were not bound by the opinion of the witness. They might have taken the facts testified by him as to the cost, quality, and condition of the goods, and come to a different opinion as to their value." *Lawson*, Exp. Ev. 68. The jury is to decide what weight, if any, shall be given to the opinions or evidence of an expert, or to the opinion of a non-professional witness. They are not bound by

such evidence, and may exercise their own experience in deciding the question touching which the opinions were given. 7 Am. & Eng. Ency. Law, 516; Atchison, T. & S. F. R. Co. v. Thul, 32 Kan. 255; Davis v. State, 35 Ind. 496; Rose v. Spies, 44 Mo. 20. We recommend an affirmance of the judgment.

PER CURIAM.—It is so ordered ; all the justices concurring.

Eminent Domain—Damages—Considerations to be Given to Opinions of Witnesses.—See *McReynolds v. Burlington, etc., R. Co.* (Ill.), 14 Am. & Eng. R. Cas. 172.

PENNSYLVANIA, POUGHKEEPSIE & BOSTON R. CO.

v.

ROOT *et al.*

(*New Jersey Supreme Court, February 20, 1891.*)

Eminent Domain—Damages—Experts.—In condemnation proceedings, when the damages done to a farm by the location of a railroad arise entirely from its changed agricultural conditions, a farmer is an expert with respect to the value of the lands before the laying of the road, as compared with their value after that transaction. But when, beyond this, the value of the land has been affected injuriously in other ways, as from its exposure to be fired by passing locomotives, etc., a farmer cannot make such comparison of values as an expert.

ERROR to Circuit Court, Sussex County.

Martin & Conklin, for plaintiff in error.

Francis J. Swayze, for defendants in error.

BEASLEY, C. J.—This was a proceeding to condemn lands for railroad purposes. The property so sought to be taken was part of a farm. The first question presented for the consideration of this court is whether, in such an injury, before a jury, on appeal to the circuit court, it is lawful to ask a witness, who is a farmer, acquainted with the value of farm land in the neighborhood of the property condemned, what, in his opinion, is the market value of the farm in question before the running of the railroad through it, and what is its value after such event? It seems to me that this question, in its broad sense, cannot be answered categorically, either in the affirmative or the negative; for the legality of the interrogation depends on the incidents of the case that is trying. The witness is an expert on certain subjects, and his opinions have no place in the judicial investigation except by reason of such *status*. Within the sphere of his special knowledge, he is competent to express his opinion; beyond that reach, he is not compe-

Farmer as expert with respect to value.

tent. Such is, beyond question, the general rule; none but experts on the given subject can, in any course of law, express their estimate of the value of anything, real or personal. Such it is believed is the universal practice of all courts that are controlled by the methods of the common law. Carrying, therefore in our mind this doctrine that the witness in question is competent to express his opinion only upon subjects to which his special knowledge relates, it is easy to see that, in the class of cases to which the present one belongs, sometimes the interrogatory above stated will be legitimate, and at other times not so. Thus, if the effect of the taxation of the railroad in a particular case is simply to sever the fields of a farm from each other, producing the necessity of putting and keeping up additional fences, and producing inconvenience in the tillage of the farm, if these be the sole detriments in question, it would seem plain that the farmer would be an expert as to the quantum of such impairment. The situation would be the same as that which is occasioned by the laying out of a common highway under similar circumstances, and the effect on the value of the property by the railroad or by the highway would be identical. As such intersections of land are of common occurrence, and the expense and inconveniences proceeding from them are well known practically to every agriculturalist, and are equally unknown to persons of other callings, it necessarily follows that the former must be regarded in courts of law as possessed of the knowledge of the specialist on the subject. In such a posture of affairs, the opinion of the farmer touching the value of the given farm before such intersection of it, as compared with its value subsequently, is manifestly admissible, as the difference between such values is the exact measure of the damage that has been done. But, in cases of the intersection of farms or other lands by railroads, the problem with respect to the damage thereby inflicted is oftentimes one of greater perplexity than that which is presented in the class of instances just referred to. By such transactions, property of this kind is frequently damaged beyond that which ensues from a change merely in its agricultural conditions. For example, let the road run within a few yards of the dwelling house upon the farm; clearly, such building may be subjected to some risk of being fired by sparks from locomotives, and its inmates disturbed, by night and by day, by the noise, dust, and smoke occasioned by the frequent trains. And it would seem evident that, with regard to the damage thus inflicted, no person can claim to be an expert. On this subject all men stand on an equal footing, for each case that arises must necessa-

Cases in which farmer's opinion is not competent.

rily be differently conditioned. It is presumed that no court would permit a witness, because he is a farmer, to be directly asked how much, in his opinion, the value of the farm had been lessened by reason of its dwelling house being subject to the noises and smoke of passing locomotives, and yet it would seem undeniable that such an opinion in the case just stated would be embraced in a general statement of the witness as to the decreased market value of the property after the laying of the road; for, if we suppose the mischief stated to be represented by the sum of \$1,000, the selling value of the premises would obviously be diminished in about that measure. The result, therefore, is that a farmer is to be deemed competent, in this class of cases, to express his opinion as an expert with respect to the value of the lands, both before and after the laying of the railroad, whenever the damage that has been done has arisen solely from a change in the agricultural conditions of the property, and that he is not so qualified when there are other causes of damage of the indefinite nature of those just specified. In the present instance there was no testimony relating to the damages except those supposed to have been occasioned by the mere intersection of the farm by the railroad, and consequently the opinion of the witness as an expert with respect to them was admissible. There was no error in this particular. The evidence was properly received by the trial judge. The other objections pressed in the briefs of counsel have been examined, but in these respects there is neither error nor matter requiring discussion. Let the judgment be affirmed.

Eminent Domain—Competency of Witnesses to Give Opinion Evidence as to Value of Land.—See note 44 Am. & Eng. R. Cas. 136.

Although a witness may not be able to state absolutely the value of land, yet he may give his opinion, where it is shown that he is familiar with the locality and the general surroundings. *San Antonio & A. P. R. Co. v. Ruby*, (Texas Sup. Ct., March 10, 1891), 15 S. W. Rep. 1040.

In *Papooshek v. Winona & St. P. R. Co.*, 44 Minn. 195, it was held that there is no inflexible rule of law defining how much a witness must know about property before he can be permitted to testify as to its value. It must appear on the preliminary examination that he has knowledge on the subject sufficient to enable him to form an estimate of its value, and such as it may be supposed the jury do not have. It is then for the court to determine the question of his competency; and if the evidence is received the jury will determine the weight and worth of it, in view of all the circumstances as developed on the examination.

Opinion Evidence as to Amount of Damage Sustained—Qualification of Witness to Testify.—In *Chicago, K. & W. R. Co. v. Easley*, (Kansas, May 9, 1891), 26 Pac. Rep. 731, it was held that where a party, seeking to recover damages to a farm consisting of 160 acres, puts a witness on the stand to prove his damages, and the witness says he cannot set a value on 80 acres of the land, and does not know the market value of the other 80, but says it is in his judgment worth \$20 per acre, it is error to permit him, over the

objection of the adverse party, to state how much less the whole farm was worth immediately after the appropriation of the right of way across it by the railroad company than it was immediately before such right of way was appropriated.

Qualification of Witness to Speak as an Expert—Form of Objection to Question.—An objection to a question asking a witness how much the land in question was worth before the road was run through it, on the ground that "no proper basis had been laid, and as called for a mere opinion," cannot be interpreted as an objection that the witness had not shown any qualification to speak as an expert. *Evansville & R. R. Co. v. Swift*, (Indiana, April 8, 1891), 27 N. E. Rep. 420.

Competency of Witness to give Opinion as to Value of Fruit Trees on Land Taken.—A person who has testified on the trial that he is 50 years of age; that he has followed farming all his life; that he has had experience in growing orchards of fruit trees; that he has put out in his life time three or four different orchards; that he knew at the time of the construction of the railroad through the premises that there was "quite a nice little orchard there;" that he had been over the premises very frequently; that he lived only two miles from the same; that while he could not say he knew the particular trees taken, he knew what fruit trees planted in such an orchard were reasonably worth at the time of the construction of the road, —is competent to give his opinion of the value of fruit trees, two, three, and five years old, which were growing in an orchard on the premises, but taken or destroyed by a railroad company in constructing its road over its right of way. *Chicago, K. & W. R. Co. v. Mouriquand*, (Kansas, Jan. 10, 1891), 25 Pac. Rep. 568.

Competency of Witness to give Opinion as to Proportion of Land Subject to Overflow.—In *Chicago, K. & W. R. Co. v. Donelson*, (Kansas, Jan. 10, 1891), 25 Pac. Rep. 584, which was a condemnation proceeding for a right of way of a railroad, it was claimed that the construction of the road interfered with the natural drainage of the land not taken; that the ditches would not carry off the water, and a portion of the land would be overflowed and injured. A witness, who was acquainted with the land, and had seen the road and ditches since they were made, but who had not measured the capacity of the ditches, and had not seen an overflow of the land, there having in fact been none since the construction of the road, was asked, and allowed to answer, what proportion of the plaintiff's land was subject to overflow from the ditches. *Held* that, as the witness was not a surveyor or civil engineer, and had no special skill that would enable him to take levels or make calculations as to the quantity of water which would accumulate, and could be discharged through the ditches, or to make measurements and calculations to the extent of land that would be affected, if there was an overflow of the ditches, was not competent to give an opinion upon the subject, and that his testimony should have been excluded. The court said: "The question involved a calculation in engineering, as to the extent of country drained into the ditches, and the dimensions and capacity of the ditches to carry off the surface water that might flow into them. The sloping character of the ground and the level of the ditches should be considered to determine the rapidity of the flow, and the capacity of the ditches to discharge the water. If the ditches were insufficient to carry off the water that would probably fall in that section of the country, and upon the area that would run into the ditches, then the witness would have to determine the extent of the land that would be reached by an ordinary overflow, and the rapidity of such overflow would have much to do with the injury that would result therefrom. A surveyor or civil engineer who had made a survey of the ditches, and had taken levels at various points upon the land liable to be over-

flowed, would have been a competent witness. But the witness was not skilled, and presented no claims entitling him to give an opinion as a scientific expert. As a farmer, he might give his opinion on matters ordinarily connected with farming, and his testimony was proper, so far as it related to specific facts. We find no testimony of an overflow from the ditches since the construction of the road, nor anything which satisfactorily shows the incapacity of the ditches to carry off the surface water which would probably pass into the same. The jury made a liberal award for the anticipated damages from this cause, based largely upon incompetent testimony; and hence the ground of error assigned must be sustained."

Opinion Evidence as to Injury to Land not Taken—Opinion of Witness not an Expert.—In *Chicago, P. & St. L. R. Co. v. Nix*, (Illinois, March 31, 1891), 27 N. E. Rep. 81, it was held that a witness, although not shown to be an expert, may be asked what, in his judgment, would be the injury to the land not taken by a railroad company for its right of way. The court said: "The question called for the opinion of the witnesses as to the value of the land not taken, as affected by the construction and operation of the railway. It is not the rule that, on the question of the value of property, no witnesses can be examined but those engaged in buying and selling the species of property under investigation, but on the contrary, any person knowing the property and its value may testify, the weight to be given to their testimony being left to the jury. *White v. Herman*, 51 Ill. 243; *Johnson v. Freeport & M. R. R. Co.*, 111 Ill. 413, 25 Am. & Eng. R. Cas. 192. The precise question arising here was decided in *Keithsborough & E. R. Co. v. Henry*, 79 Ill. 290, where it was held that, on an assessment of damages, under a proceeding by a railroad company to condemn a right of way through a farm, it is competent for witnesses who are acquainted with the farm, and familiar with the use and productions of such property, and its value, to give their opinions as to the extent of damage which the construction of the road over the same will occasion, leaving it to the jury to give their evidence such weight as in their opinion it may deserve."

Expert Testimony as to Value of Land—Details on Which Opinions are Founded.—In estimating the value of land taken by a railroad company for a right of way, the possible and probable uses of the land are important elements, and may be shown by the opinions of experts. But the details of improvements, the cost, probable rent afterwards, etc., require knowledge on the subject to insure the proper weight to be given, and the inferences to be drawn from them. Hence, they are not admissible as independent facts for the jury, but such details ought to enter into the view of the expert in forming his judgment, and whether they have done so is a legitimate subject of cross examination. *Harris v. Schuylkill River E. S. R. Co.*, (Pennsylvania, April 6, 1891), 21 Atl. Rep. 590.

Evidence as to Value of Trees Growing on Land.—In a condemnation suit the court permitted evidence as to the value of apple trees growing upon the land taken to be given to the jury independently of the value of the land to which they were attached. The evidence was not objected to at the time it was offered, and it was not apparent from the verdict that the evidence affected it. *Held*, that the appellant, on appeal, could not complain of the introduction of such evidence. *Chicago, P. & St. L. R. Co. v. Graney*, (Illinois, Nov. 5, 1890), 25 N. E. Rep. 798.

Opinion as to Value of Property—When Value of Adjoining Property may be Inquired Into.—In *Kansas City & T. R. Co. v. Vickroy*, (Kansas, May 9, 1891), 26 Pac. Rep. 698, it was held that in appeals from the awards of commissioners in condemnation proceedings, opinions as to the value of property should be confined to the property in question, unless on cross examination, for the purpose of testing the knowledge and competency of the witness, the value of adjoining property is inquired of.

CHICAGO, KANSAS & NEBRASKA R. CO.

v.

NEIMAN.

(Kansas Supreme Court, March 7, 1891.)

Eminent Domain—Damages—Opinion Evidence.—The opinion of a witness, giving in the lump the amount of damages, present and prospective, which a landowner will sustain by the appropriation of a right of way for a railroad through his land is not admissible as evidence.

ERROR from District Court, Harvey County.

Ady & Henry and W. F. Evans, for plaintiff in error.

Bowman & Bucher, for defendant in error.

JOHNSTON, J.—The Chicago, Kansas and Nebraska Railway Company instituted proceedings to condemn a right of way for its railroad through Harvey county. A strip of

Case stated.

land through the farm of I. H. Neiman, amounting to $7\frac{24}{100}$ acres, was desired, and the commissioners who had been appointed appraised the value of the land appropriated at \$289.60, and estimated the damages for depreciation and injury to adjoining lands, not appropriated, at \$410, making a total of \$699.60. Neiman appealed to the district court, where a trial was had with a jury, and where damages were awarded in the sum of \$1,611.70. The principal complaint, and the only one that we need notice, is the admission by the court of incompetent testimony. The following question was asked and the answer given over the objections of the railroad company: "*Question.* How much less, in your opinion, was the farm worth after the railroad had established their track through it, irrespective of any benefit to be derived from said track, taking into consideration the damage, present and prospective, the incidental loss, inconvenience, present and prospective, which may reasonably be expected to exist from maintaining the said railroad track to be continued permanently? *Answer.* \$2,800 less, or \$9,200 afterwards." A substantially similar question was asked another witness, and an objection was made at the time, but the objection was overruled, and the witness answered, "About \$1,300." It is contended by the plaintiff in error that under these rules the province of the jury was invaded by allowing the witnesses to determine by their opinions the exact question that the jury was called to decide. The precise question presented was determined by this court in *Wichita & W. R. Co. v. Kuhn*, 39 Kan.

Opinion as to amount of damages not admissible.

675, 33 Am. & Eng. R. Cas. 159. The question asked and

answered in that case was almost identical with the one propounded in this, and the court held that the admission of the testimony was erroneous, and that it was virtually asking the witness to decide the case for the jury, and to advise them what their verdict should be. It cannot be said that the error was an immaterial one, as the witnesses differed widely in their opinions of the values of the property and of the damages suffered. The estimates ranged all the way from \$800 up to \$2,800, and those witnesses who had assumed the functions of the jury and lumped the damages suffered, were among those who placed the damages at the highest sum. The reasoning and cases cited in *Wichita & W. R. Co. v. Kuhn*, *supra*, are equally applicable here, and must rule in the present case. We do not deem it necessary to notice the other points that have been discussed in the case. The judgment will be reversed, and the cause remanded for a new trial.

All the justices concurring.

Eminent Domain—Admissibility of Estimates by Witnesses as to Amount of Damages.—See *Sherman v. St. Paul M. & M. R. Co.*, (Minn.) 10 Am. & Eng. R. Cas. 193; *Wichita & W. R. Co. v. Kuhn*, (Kan.) 33 Am. & Eng. R. Cas. 159.

In *Nevada & M. R. Co. v. De Lissa*, 103 Mo. 125, it was held that in an action to condemn a right of way for a railroad, upon an issue as to the damages by the construction of the road over defendant's farm, it is not error to permit witnesses shown to be competent and acquainted with the premises, and the character of the land, and whether improved or not, to express their opinions as to the damages, including the value of the portion taken, and the damage done to the rest of the tract. Following *Springfield & Southern R. Co. v. Calkins*, 90 Mo. 538.

In *Dallas & G. R. Co. v. Chenault*, (Texas Ct. of App. May 10, 1890), 16 S. W. Rep. 173, which was a suit to condemn lands by a railroad company, several witnesses testified that the tract of land was damaged from \$2000 to \$3000. This was their opinion. They said they did not know how much it had decreased in market value; that if they owned the place they would consider they had been damaged that much. In instructing the jury the court charged that the burden of proof was on the landowner to show the damages sustained by him, and, if the value was less after the taking, and the decrease was the result of the construction and operation of the railway, then the jury should find for the landowner the amount of such decrease in addition to the value of the land taken. *Held*, that when considered with reference to the charge of the court, there was no error in the admission of the testimony.

Right of Witnesses to Testify Directly as to Amount of Damages Sustained.—In *Leavenworth, N. & S. R. Co. v. Herley*, (Kansas, March 7, 1891,) 26 Pac. Rep. 23, the court, without deciding anything, considered the point whether it is permissible to allow witnesses, in condemnation proceedings, to testify directly as to the amount of damages sustained, and said: "We suppose that the railway company in the present case will admit that a witness sufficiently competent may testify as to the value of the land before the taking of the right of way and the value of the land afterwards, and indeed as to the values generally, so far as the same may have application to the case; and that he may also testify in detail with regard to the situa-

tion of the land, and with regard to all things connected therewith which might tend to render the land more valuable or less valuable, or which might constitute elements of value or want of value, or that might tend to prove value or want of value; and that the witness might also testify as to every fact which might constitute an element of damage or tend to prove damage. See the cases of *Kansas City & S. W. R. Co. v. Ehret*, 41 Kan. 22, and cases there cited; *Commissioners of Smith Co. v. Labore*, 37 Kan. 480, 484, 485. But the railway company claims that a witness cannot testify in comprehensive terms to the amount of damages which he may think the landowner has suffered or may suffer by reason of the appropriation of the right of way. It has been suggested in favor of a witness giving direct testimony as to the amount of damages to be recovered, that as the amount of the damages to be recovered is the final result to be reached upon the testimony of all the witnesses, each witness should be permitted to state in direct and explicit terms just how much he thinks the damages are. The railway company answers that this cannot be done, for the simple reason that the amount of damages to be recovered is the final result to be reached in the action,—the final fact to be ascertained by the jury; and that the jury alone, and not the witness, is the proper tribunal to determine this fact, which is generally an exceedingly comprehensive and complex fact, depending upon and including innumerable details. Suppose that the plaintiff in an action for personal injuries—an action for assault and battery for instance—should be a witness, would it be proper to ask him such questions as these: How much were you damaged? What is the amount of your damage? What amount are you entitled to recover? We do not think it is necessary to determine whether the court below committed any material error in permitting witnesses to testify directly as to damages or not, and we shall therefore pass to the next question."

CHICAGO, KANSAS & WESTERN R. CO.

v.

MULLER.

(*Kansas Supreme Court, Dec. 6, 1890.*)

Eminent Domain—Opinion Evidence.—In the trial of a case, upon appeal from an award of damages in condemnation proceedings, the court permitted the plaintiff, as a witness, to answer the question: "How much less was the farm worth immediately after the railroad went through, per acre, than it was before?" *Held*, that it was error, as it involved substantially the subject matter the jury were called upon to determine. *JOHNSTON, J.*, dissenting.

Same—Expert Evidence as to Value—Witness Volunteering Statement as to Amount of Damages.—Where a witness is asked, upon cross-examination, a question as to his knowledge of values, and volunteers the following statement: "A neighbor of mine right north of me has one hundred and twenty acres, and was offered six thousand dollars,"—and the court refused the request of the defendant to withdraw such statement from the jury, *held* error.

COMMISSIONERS' decision. Error from District Court, Sedgwick County.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error.

Sluss & Stanley, for defendant in error.

GREEN, C.—George Muller owns the N. W. $\frac{1}{4}$ section 28, township 29 S., range 2, in Sedgwick county. The plaintiff in error condemned a right of way for a railroad over said land, and 5 $\frac{1}{100}$ acres were taken for which the commissioners allowed \$439.40. The defendant in error appealed from this award to the district court, and a jury assessed his damages at \$800, and a judgment was rendered accordingly. The railroad company excepted and brings the case here. Case stated.

1. The first error alleged is in the admission of evidence. The plaintiff was asked how much less the land was worth immediately after the railroad went through, per acre, than it was before. An objection to this question, on the ground that it called for a conclusion, was overruled, and the witness was permitted to answer: "Five dollars less an acre." This with similar evidence, it is claimed, is clearly prejudicial, because it is a statement of the judgment and conclusion which the jury should reach and not the witness; that it was improper to permit the witness to usurp the province of the jury and give his own opinions and conclusions. In the case of *Wichita & W. R. Co. v. Kuhn*, 38 Kan. 675, 33 Am. & Eng. R. Cas. 159, the following question and answer were held to be erroneous: "*Question.* How much less, in your opinion, is this farm worth after the railroad company had established its track through it, irrespective of any benefits from any improvement proposed by the railroad company to be derived from said track, taking into consideration all incidental loss, inconveniences, and damages, present and prospective, which may reasonably be expected or shown to exist from the maintaining of said railroad track, to be continued permanently? *Answer.* About \$2,100." The court said, with reference to this evidence: "The court below certainly should not have permitted this evidence to be introduced. It involved substantially everything that the jury were called upon to determine, and left nothing for the jury to decide. It invaded the province of the jury. It really amounted to letting the witness himself determine by his own opinion what the plaintiff's damages were, and the amount which the plaintiff should recover in the action. It had no reference particularly to the market value of the land, either before or after the right of way was taken; nor any reference to any specific fact which might tend to show what such market Opinion evidence as to amount of damages.

value was, or to increase or diminish the same; but it involved all these things, and a great deal more. Upon the questions involved in this case we would refer generally to the following authorities: 3 Suth. Dam. chap. 16; Union R. Transfer & Stock-Yard Co. v. Moore, 80 Ind. 458, 5 Am. & Eng. R. Cas. 352, note and cases there cited; McReynolds v. Burlington & O. R. R. Co., 106 Ill. 152, 14 Am. & Eng. R. Cas. 175, note and cases there cited; Neilson v. Chicago M. & E. W. R. Co., 58 Wis. 516, 14 Am. & Eng. R. Cas. 244, note, and cases there cited; Grafton & G. R. Co. v. Foreman, 24 W. Va. 662, 20 Am. & Eng. R. Cas. 225, note and cases, there cited." We can see no very great distinction between the two questions. Each calls for the opinion and conclusion of the witness, and, upon the authority of the case *supra*, it was error to permit the question and answer. Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169, 44 Am. & Eng. R. Cas. 51; Elliott, Roads & S. 198; Mills, Em. Dom. § 165; Ohio & M. R. Co. v. Nickless, 71 Ind. 271; Dalzell v. Davenport, 12 Iowa, 437; Hoshier v. Kansas City, St. J. & C. B. R. Co., 60 Mo. 329; Tingley v. Providence, 8 R. I. 493; Rockford, R. I. & St. L. R. Co. v. McKinley, 64 Ill. 338; Railroad Co. v. Burkett, 42 Ala. 83; Cleveland & P. R. Co. v. Ball, 5 Ohio St. 568; City of Omaha v. Kramer, 25 Neb. 489, 27 Am. & Eng. Corp. Cas. 73.

2. In the cross-examination of the plaintiff, the question was asked as to what sales had been made in the neighborhood, upon which he based his judgment as to values, and, without being asked, he volunteered this statement: "A neighbor of mine right north of me has one hundred and twenty acres, and was offered six thousand dollars." The defendant in error moved that this statement of the witness be stricken out. The request was denied, and a proper exception made. This, we think, was error, and the court should have withdrawn the statement from the jury. The plaintiff in error complains of certain instructions given and refused, but we see nothing prejudicial in these. While the thirteenth instruction, in relation to damages for the accidental setting out of fires, or the accidental killing of stock, may not have been applicable and supported by the evidence, the defendant below was not prejudiced thereby, as the jury allowed nothing for such injuries. For the reason indicated as to the admission of evidence, we recommend a reversal of the judgment.

Witness volunteered statement as to value.

PER CURIAM.—It is so ordered.

HORTON, C. J., and VALENTINE, J., concur.

JOHNSTON, J.—I agree that there must be a reversal, but I base my conclusion solely on the second ground of error stated in the commissioner's opinion.

Eminent Domain—Opinions of Witnesses Estimating Damages.—See *ante* Chicago, K. & N. R. Co. v. Neiman, and note, pp. 186, 187.

Damages to Land not Taken—Evidence as to Worth of Improvements to Land.—In proceedings by a railroad company to condemn a right of way through a farm, certain witnesses were allowed to state how much the improvements upon the portion of the farm not taken for the right of way were worth to the land. *Held*, that it could not be said that such evidence was improper. The court said: "Where certain evidence shows the value of the land not taken with the improvements thereon, as such value is before the construction of the road, and other evidence shows the reduced value thereof as it will be after the construction of the road, the jury are enabled to determine the extent of the depreciation, and consequently the amount of damages caused by the improvement. The point decided in *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253, that the cost of the improvements is not a true test of the value of the premises, does not arise in this case." Chicago, P. & St. L. R. Co. v. Eaton, (Illinois, Jan. 24, 1891), 26 N. E. Rep. 575.

Evidence as to Damages Arising from Railroad Remaining Unfenced.—In proceedings to condemn land for railroad purposes, it is proper to allow witnesses to state what damages will arise from the railroad remaining unfenced for a period of six months, during which the law does not compel the company to fence its track. Chicago, P. & St. L. R. Co. v. Eaton, (Illinois, Jan. 24, 1891), 26 N. E. Rep. 575.

Condemnation of Farming Lands—Evidence as to Size, Number, and Value of City Lots Near By.—In an action to recover the value of a tract of land appropriated by a railway company for right of way, which, at the time of its condemnation, was not platted as a part of a city but was in use as farming land, it is erroneous to permit witnesses to testify to the value of lots on the principal business street of a city near by. The value of such lots furnishes no proper measure by which to ascertain the value of the land taken. In such a case, it is also error to permit a witness to testify to the size of lots upon said business street, the number of such lots contained in an acre, and the value of such lots. *Kansas City & T. R. Co. v. Splitlog*, (Kansas, Dec. 6, 1890), 25 Pac. Rep. 202.

Evidence as to How Many Lots Tract Could be Divided Into.—In testifying as to the value of land, witnesses may consider its location, and the effect of its location upon its value as a whole; but they cannot testify as to how many building lots the tract of land would make; such evidence is wholly improper. *Kansas City & T. R. Co. v. Vickroy*, (Kansas, May 19, 1891), 26 Pac. Rep. 698.

Evidence as to Necessity for Driving Stock over Track.—In railroad condemnation proceedings evidence is admissible on defendant's behalf to show that his pasture land was located on one side of the railroad and his tillable land on the other side, so that it would be necessary for defendant to drive his stock backward and forward over the track. *Chicago, M. & St. P. R. Co. v. Baker*, 102 Mo. 553.

Evidence as to Danger to Stock as an Element of Damages.—In proceedings by a railroad company to condemn land for a right of way, the court instructed the jury, that in assessing damages the landowner was not to be allowed anything for possible damage to stock from the use of the right of way. Some of defendant's witnesses in giving their reasons for placing the damages at a certain figure made reference to danger to stock. *Held*

that the error was harmless. *Chicago, P. & St. L. R. Co. v. Blume*, (Illinois, May 9, 1891,) 27 N. E. Rep. 601.

Evidence as to cost of Rebuilding Tramway made Necessary by Railroad Track.—Where, in a condemnation suit, it appears from the evidence that the construction and operation of the proposed railroad will necessitate the rebuilding of a tramway leading from a coal mine to a railroad track, evidence of the cost of rebuilding such tramway is admissible in proof of damages, although it appears that the tramway when so rebuilt will be worth more than before. *Chicago, P. & St. L. R. Co. v. Wolf*, (Illinois, March 31, 1891,) 27 N. E. Rep. 78. The court said: It appears that the coal company had, in connection with its coal mine, a tramway running from its coal-shaft to the coal-chutes of the other railroad company, and was, and for several years had been, using said tramway for the purpose of conveying coal from said shaft to and loading it upon the cars and engines of said railroad company. The evidence tends to show that said tramway was sufficient for all the then present requirements of the coal company's business, and also that such tramway was absolutely necessary to the proper operation of said mine and the shipment of coal therefrom. The construction and operation of appellant's railway will make it necessary to raise said tramway about eight feet, or to tear it down, and erect another in its stead. One of these things the coal company will be compelled to do in order to restore its mine to its present state of efficiency. We think it clear, then, that for the purpose of making an intelligent estimate of the damages to the mining property which will be the necessary and proximate result of the construction and operation of the railway, the cost of raising the present tramway to the proper height, or of constructing a new one in its place, was a proper matter for the consideration of the jury."

Evidence as to what Landowner Paid for Land.—The inquiry, in an action to try title to land over which a railroad company has constructed its road, and in which the company by its answer seeks to condemn the land, should be confined to the value of the land at the time of the trial. Accordingly, it is not error to exclude evidence of what the owner paid for the land. *San Antonio & A. P. R. Co. v. Ruby*, (Texas Sup. Ct., March 10, 1891,) 15 S. W. Rep. 1040.

Evidence as to what Owner Would Sell Property For.—The plaintiff brought trespass against a railroad company to recover damages for consequential injuries to his property, arising from the construction and operation of defendant's siding upon a public street in front of it. *Held*, that in such case, it was not error to refuse the defendant's inquiry of the plaintiff, whether he would take a certain sum for the property as affected by the siding, and of its own witness, whether the latter would give a certain sum for the property thus affected. *Auman v. Philadelphia & R. R. Co.*, 133 Pa. St. 93.

Evidence as to Bona Fide Offers made for the purchase of a lot not taken abutting land taken under the right of eminent domain is admissible to prove the value of the land not taken upon the issue of damages, the weight of such evidence and the *bona fides* of the offer being questions of fact for the jury. *Muller v. Southern Pac. B. R. Co.*, 83 Cal. 240.

Evidence as to Discharge of Sewage on Land Affecting its Value.—In an action for the taking of land for a railroad right of way, in considering the damages to be allowed the landowner, evidence that a city sewer, even though without right, discharged its contents on the land, is admissible, as affecting its value at the time of the taking. *Harris v. Schuylkill River E. S. R. Co.* (Pennsylvania, April 6, 1891), 21 Atl. Rep. 590.

Evidence as to Greater Price where Land is Taken Without Owner's Consent.—In *Chicago, P. & St. L. R. Co. v. Graney*, (Illinois, Nov. 5, 1890,) 25 N. E. Rep. 798, which was a proceeding to condemn a right of way for a

railroad company, it was objected on appeal that evidence was admitted tending to prove that because a small strip of land was taken, and that against the landowner's consent, a greater price proportionately should have been awarded, than if the entire body of land had been taken with his consent. The verdict assessed the damages for the land taken at a less rate per acre than the entire farm was shown by the evidence to be worth; and the damages for land not taken was assessed at one-half the amount testified to by the owner's witnesses. The jury were instructed that they could not add anything to the damages because the land was taken without the owner's consent. *Held*, that the admission of the evidence was harmless error.

Evidence as to Buildings on Land Separated from Farm.—Where, in condemnation proceedings, a railroad company has offered evidence to show that the land separated from the farm buildings might be sold to adjoining owners at but little loss, it is proper in rebuttal to show that the buildings are too large and valuable to be suited to the farm if such land were sold. *Chicago, P. & St. L. R. Co. v. Graney*, (Illinois, Nov. 5, 1890), 25 N. E. Rep. 798.

Evidence as to Value of Land Before and After Road Crossed It.—In condemnation proceedings it is proper to prove by competent witnesses the value of the land without the road across it, and the value if divided by the road into parcels; and it is proper for the jury to consider such evidence in assessing the damages. *Evansville & R. R. Co. v. Swift*, (Indiana, April 8, 1891), 27 N. E. Rep. 420.

Evidence as to Assessed Value of Land.—**Estoppel of Plaintiff Who Is One of the Assessors.**—In *Smith v. Pennsylvania S. V. R. Co.*, (Pennsylvania, March 23, 1891), 21 Atl. Rep. 505, it was held that the fact that the plaintiff in a suit to condemn a right of way for a railroad, was one of the assessors for the township in which the land was situated, does not estop him from asserting that the land is of far greater value than its assessed value, where it appears that his property was assessed by the other two assessors, without his taking any part in the matter. And, in such case, it is permissible to show that the plaintiff took no part in the assessment of his own property, but left it entirely to the other two assessors.

Construction by Railroad of Ice House in Place of One Destroyed.—**Evidence as to Use of New Ice House.**—An ice company's storage house was in part destroyed by the construction of a railroad. The railroad company and the ice company agreed that the former should erect a new ice house, and that the latter might take it at cost, allowing the same "as an offset to the damages awarded to them," this agreement not to prejudice the rights of either party. It was further agreed that if the ice company should regard the bill for the cost of the house as excessive, experts should be appointed to fix its just cost and decide whether said company's business could conveniently be carried on in it. The ice company accepted the house when built, and used it, without disputing the bill for its cost. Upon the assessment of damages for the construction of the railroad, it was proper to show that the use of the house in the ice business was inconvenient and expensive, not by reason of defective construction of the house, but in consequence of the presence of the railroad track, and that the value of the property was depreciated by such inconvenience. *Rees v. Schuylkill River, E. S. R. Co.*, 135 Pa. St. 629.

Taking Lot Abutting on Street—Evidence as Line of Street—Common Reputation.—In an action to recover damages for the taking of land by a railroad company, consisting of part of a city lot situated on a public street, evidence of common reputation or hearsay, existing before the controversy arose, as to the initial point of the survey of the street, to show the line of the street, is admissible. Common reputation or hearsay is admissible to

establish a boundary line of general or public interest, provided it existed before the controversy arose. *Muller v. Southern Pac. B. R. Co.*, 83 Cal. 240.

MONTANA R. CO.

v.

WARREN *et al.*

(137 *United States*, 348.)

Eminent Domain—Damages—Opinion Evidence as to Value of Land.—In an action to recover compensation for land taken for railroad purposes, consisting of an undeveloped "prospect" in mineral lands, the opinion of a competent witness, familiar with the country and its surroundings, as to the value of the land taken, may be received in evidence.

Same—Competency of Witness to give Opinion as to Value.—No exact rule can be laid down as to the amount of knowledge which a witness, as to the value of land condemned for railroad purposes, must possess; the determination of that matter must rest largely in the discretion of the trial court.

ERROR to the Supreme Court of the Territory of Montana.

Action by the Montana Railway Company to condemn a right of way over a certain mining claim in Silver Bow County, Montana, known as Nipper Lode. A motion by the railway company for a new trial in the district court of Montana, was overruled and denied, and the judgment entered upon a verdict assessing the damages at \$7,000. The railway company then carried the case to the supreme court of the territory of Montana, where the judgment below was affirmed. The company thereupon sued out this writ of error.

John F. Dillon and *Harry Hubbard*, for plaintiff in error.

S. S. Burdett, for defendant in error.

BREWER, J.—The plaintiff in error, desiring to construct its railroad through a tract of land belonging to the defendants in error, the same being a mining claim known as the "Nipper Lode," situated in Silver Bow county, Montana territory, took appropriate proceedings for the condemnation of a right of way. The appraisers assessed the damages at \$1,552. From such appraisement the defendants appealed to the district court, and on trial there the jury found the damages to be \$7,000, for which, with costs, judgment was entered against the railroad company. An appeal was taken to the supreme court of the territory, which affirmed this judgment; which judgment of affirmance has been brought before us for consideration. The opinion of that court will be found in 6 Mont. 275.

A preliminary question is presented by the defendants in error. They insist that no bill of exceptions was taken at the trial, and that therefore no rulings of the trial court are before us for consideration, citing as authority the case of *Kerr v. Clappitt*, 95 U. S. 188. In that case, as in this, after the trial a statement of the errors alleged, upon which a motion for a new trial was based, was prepared and filed: but, although signed by counsel, it was held by this court to be not the equivalent of a bill of exceptions, and to be available only for the purpose expressed, to-wit, the motion for a new trial. There was in that case no stipulation that the statement should be treated as a bill of exceptions, or be available for other purposes than that of a new trial. It was not authenticated by the trial judge. Lacking that authentication, it was adjudged available only for the purpose named: and that it did not bring into the record, for review in this court, the questions presented. In this case the proceedings on the trial are embodied in a statement prepared like that for the purpose of a motion for a new trial; but in addition, it is authenticated by the trial judge as a correct statement of the proceedings. Further than that, at the trial a bill of exceptions was prepared in respect to the rulings of the court on instructions, signed by the trial judge and filed at the time, which bill of exceptions was incorporated in the statement. So that we have a separate and perfect bill of exceptions as to the ruling of the court on the matter of instructions, and a statement of all the proceedings in the trial, approved by counsel and authenticated by the trial judge. This proceeding was authorized by the statutes of Montana, and must be adjudged as sufficient for the purposes of review here.

Appeal—Condition of record.

When the case was brought to the supreme court of Montana, no new assignment of error was made. The only specifications of error were in the statement prepared for the motion for a new trial in the district court. Perhaps nothing more was necessary, and all the questions arising on the trial may have been open to consideration. Be that as it may, the opinion of the supreme court opens by saying: "There are assignments of error in the statement which are not referred to in appellant's brief, and which will therefore not be considered by this court. Those relied upon are as follows." It then discusses them, and closes with the statement that "these are all the errors complained of and relied upon in appellant's brief." The court also comments upon the character of the record, and says: "It is certainly apparent that it is not such a record as should be filed in this court." The question now arises whether

Assignment of errors.

our inquiry is limited to the matters presented to and considered by that court, or should be broadened to all matters that transpired at the trial. Obviously, the former. Error is alleged in the judgment of the supreme court of the territory, and if in all matters presented to it its rulings were correct, it cannot be affirmed that its judgment was erroneous because there was in the record matters not vital to the question of jurisdiction or the foundation of right, but simply of procedure, to which its attention was not called, and in respect to which its judgment was not invoked. All such matters must be considered as waived by the complaining party. It would be an anomaly if a party feeling himself aggrieved by the rulings of a trial court could appeal to the supreme court of his territory, and invoke its judgment on certain alleged errors, and when defeated there could transfer the judgment of that territorial supreme court to this, and ask a reversal here of its judgment on grounds involving mere matters of procedure in the prior trial, to which its attention was not directed. It is fundamental that when the judgment of a court is challenged in error its rulings alone are open to consideration. Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance: but mere matters of error may always be waived and they are waived when the attention of the reviewing court is not called to them. Our conclusion, therefore, is that our inquiry in this case is only in relation to the matters presented to and reviewed by the supreme court of the territory.

They are three in number: *First*, that the verdict indicates passion and prejudice. Obviously, there is no foundation for this. If the testimony admitted by the trial court was competent, there was ample foundation for the verdict. If the witnesses were to be believed, and their testimony was competent, the verdict was not excessive. And the *second* of the three points presented to the supreme court, which was that the evidence was not sufficient to justify the verdict, thus fails. There remains for consideration but a single point,—that there was admitted in evidence on the trial the opinions of witnesses as to the value of land, which were not based upon the sale of the same or similar property, and were not therefore the opinions of persons competent to so testify. It appears that the land taken was a strip running through a mining claim, which had been patented and belonged to the defendants in error. The claim adjoined the Anaconda mining claim, which had been developed and worked, and demon-

Opinion of
witnesses as
to value of
land.

strated to contain a vein of great value. The claim in controversy had been developed so far as to indicate that possibly, perhaps probably, the same rich vein extended through its territory. It had not been developed so far that this could be affirmed as a fact proved. The strip taken ran lengthwise through the claim; and upon the trial witnesses were permitted to testify as to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony, but it is the best of which, in the nature of things, the case was susceptible. That this mining claim, which may be called "only a prospect," had a value fairly denominated "market value," may, as the supreme court of Montana well says, be affirmed from the fact that such prospects are the constant subject of barter and sale. Until there has been full exploiting of the vein, its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet uncertain and speculative as it is, such prospect has a market value; and the absence of certainty is not a matter of which the railroad company can take advantage when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the railroad company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities. In respect to such value, the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is largely a matter of opinion, especially as to real estate. True, in large cities, where articles of personal property are subject to frequent sales, and where market quotations are daily published, the value of such personal property can ordinarily be determined with accuracy; but even there, where real estate in lots is frequently sold, where prices are generally known, where the possibility of rental and other circumstances affecting values are readily ascertainable, common experience discloses that witnesses the most competent often widely differ as to value of any particular lot; and there is no fixed or certain standard by which the real value can be ascertained. The jury is compelled to reach its conclusion by comparison of various estimates. Much more so is this true when the effort is to ascertain the value of real estate in the country, where sales are few, and where the elements which enter into and determine the value are so varied in character. And this uncertainty increases as we go out into the newer portions of our land, where settlements are recent and values formative and speculative. Here, as elsewhere,

we are driven to ask the opinions of those having superior knowledge in respect thereto. It is not questioned by the counsel for plaintiff in error that the general rule is that value may be proved by the opinion of any witness who possesses sufficient knowledge on the subject; but their contention is that the witnesses permitted to testify had no such sufficient knowledge. It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess, and the determination of this matter rests largely in the discretion of the trial judge. *Stillwell & Bierce Mfg. Co. v. Phelps*, 130 U. S. 520; *Lawrence v. Boston*, 119 Mass. 126; *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544. The witnesses whose testimony is complained of all testified that they knew the land and its surroundings, and many of them that they had dealt in mining claims situated in the district, and had opinions as to the value of the property. It is true some of them did not claim to be familiar with sales of other property in the immediate vicinity, and the want of that means of knowledge is the specific objection made in the supreme court of the territory to the competency of those witnesses. But the possession of that means of knowledge is not essential. It has often been held that farmers living in the vicinity of a farm whose value is in question, may testify as to its value, although no sales have been made to their knowledge of that or similar property. Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property. After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination. And it is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence. We think the supreme court of Montana was right in holding that no error was committed in permitting the testimony of these witnesses. These are all the questions submitted to that court; and its rulings in respect thereto being correct, its judgment is affirmed.

Eminent Domain—Competency of Witness to give Opinion as to Value of Land.—See *ante*, *Pennsylvania P. & B. R. Co. v. Root*, and note, pp. 181, 183.

CALUMET RIVER R. Co. *et al.*

v.

BROWN.

(Illinois Supreme Court, January 22, 1891.)

Eminent Domain—Mortgagee of Land as a Necessary Party.—The holder of a mortgage upon land taken for railroad purposes is such an owner or interested party, as should be made a party defendant in the condemnation proceedings, under § 2 of the Ill. Em. Dom. Act, which provides that the petition shall state the names of "all persons interested as owners or otherwise" in the property to be taken.

Failure to make Mortgagee a Party—Mistake—Equitable Relief.—Equity will relieve a railroad company from the consequences of a mistake by abstract makers, whereby they omit to make the mortgagee of the land sought to be taken a party to the proceeding, especially, where the company has not discovered the existence of the mortgage until after it has condemned the land and built its road, and paid the compensation to the county treasurer for the benefit of the owner, and where it appears that the mortgagee must have known of the proceedings. A decree of the circuit court restraining the payment of such compensation to the mortgagor, and directing it to be paid to the mortgagee to be credited upon the mortgage debt, and if the balance of the debt is not paid, and the mortgagees are obliged to resort to foreclosure, authorizing them to have a re-valuation of the land taken, and a redetermination of the damages to the land not taken, and if the compensation is increased, to have the excess applied upon the mortgage, affirmed.

APPEAL from a judgment of the Appellate Court, first district, reversing a decree of the Circuit Court of Cook County, upon a bill filed by the Calumet River Railroad Company against John B. Brown, Richard C. Dale, and George R. Davis, County Treasurer, to restrain the county treasurer from paying to Brown certain money which the complainant had deposited with such treasurer as compensation for land condemned.

Forest O. Murdock and Sidney Smith, for appellant Davis.

Frank J. Loesch and Charles A. Allen, for appellant railway Company.

Osborn & Lynde, for appellee.

MAGRUDER, J.—In this case the appellant railway company instituted the proceeding for condemnation of land against the owner of the equity of redemption, and omitted to make the mortgagee a party to the proceeding. This omission was not due to the carelessness or negligence of the railway company, but was the result of a mistake. Section 2 of the eminent domain act provides that the petition shall state the names of "all persons

**Mortgagee a
necessary
party.**

interested, as owners or otherwise," in the property to be taken or damaged. The holder of a mortgage upon the property is such an owner or interested party as should be made a party defendant. Here the mortgage to Dale was upon record when the petition was filed, and the name of the mortgagee thus appearing of record should have been stated in the petition for condemnation.

Company misled by mistake.

In order to ascertain what persons were interested in or held liens upon the property, the company applied to a firm of abstract makers and conveyancers, whose business it was to furnish information upon such subjects, and received from such firm a report as to the title which failed to give the name of Dale, or to show the existence of the Dale mortgage. The company was thus misled without fault of its own. It paid the whole amount of the condemnation money into the hands of the county treasurer before it learned that there was a mortgage upon the property condemned. The mortgagee Dale, and Drexel & Co., who were interested with him, must have known of the proceeding to condemn, because their agent and attorney was present at the trial of the condemnation suit. They did not, however, become parties by filing a cross-petition, as provided for in § 11 of said act. The appellee Brown, the owner of the equity of redemption, and the only defendant in the condemnation proceeding, communicated no information as to the existence of the mortgage. Still, neither Brown nor the mortgagees were responsible for the failure of the company to make the mortgagees parties. It remains true, nevertheless, that the payment of the money to the county treasurer would not have taken place but for the mistake of the abstract makers as to the condition of the record. Why should not equity relieve the company from the consequences of such mistake?

Let us see what consequences might follow. The sum of \$17,500 paid to Davis, the county treasurer, was not the value of Brown's equity of redemption only. It represented the full value of the property taken, and damages to the portion of block B not taken, the former being \$4,600, and the latter \$12,900. Brown

Result of paying money to Brown.

insists upon the payment of all the money to him, and, if such payment should be made to him, he would be receiving more than the value of his interest in the property. Indeed, it is questionable if his interest is worth anything. The amount of the mortgage is \$150,000, and the proof shows that it exceeds the value of all the property subject to it. The proof also shows that Brown's indebtedness is not less than \$500,000. The mortgagees not having been made parties to the condemnation suit, their rights were not cut off by that suit.

They are still entitled to foreclose their mortgage against the land condemned. If, therefore, the money is paid to Brown, the company may be compelled to pay for the land a second time by the foreclosure of the mortgage. Such a result as this would be inequitable in the extreme.

Where the power of eminent domain is exercised, the fund paid stands in the place of the land condemned: the lien attaches to the fund; "the rights of the mortgagee remain unaltered, and he is entitled to have the money in place of the land applied to the payment of his claim." 1 Jones, Mortg. § 708; Chicago, B. & Q. R. Co. v. Chamberlain, 84 Ill. 333; South Park Commissioners v. Todd, 112 Ill. 379; Union Mut. L. Ins. Co. v. Slee, 123 Ill. 57. It is true that Dale and Drexel & Co. have not filed a bill to foreclose the mortgage, although it is overdue; they have made no application to Davis to have the money paid to them, and have made no opposition to the payment of it to Brown, not being willing, according to the proof, to "make an enemy of Brown by doing it." But at the same time they are entitled to have the money as an equivalent of the land; their lien in equity follows the fund, which is a substitute for the land. Sherwood v. City of Lafayette, 109 Ind. 411. This being so, there is reason here for the application of the well-known principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. 3 Pom. Eq. Jur. § 1414. Upon the assumption that the verdict and judgment would not have been more than \$17,500, if the mortgagees had been parties, and subject to the other qualifications hereafter stated, the mortgagees may either take the money and apply it on their debt, or resort to a foreclosure of their mortgage against the land condemned and damaged. They have two funds,—the money and the land. The appellant company has but one fund,—the land condemned,—and in equity may require the application of the money to the debt before resort is had to the land.

Fund stands
in place of
land—Lien
on fund.

Section 14 of the eminent domain act provides that the compensation may in all cases be paid to the county treasurer, who shall, on demand, pay it to the party thereto entitled. The judgment in this case orders that the "petitioner pay to the county treasurer of Cook county, for the benefit of the owner, or to John B. Brown, claimed to be such owner, the sum of \$17,500." There is here no absolute direction to pay the money to Brown. The language is in the alternative, and contemplates that some other person than Brown may be the owner. Surely a court of chancery may determine who is the owner; for

Equity will
determine
who is owner.

whose benefit the money was paid. As between the mortgagors and mortgagee, the fund belongs to the latter to the extent of the mortgage debt. As between Brown and Dale or Drexel & Co., the fund belongs to the latter, inasmuch as the mortgage debt exceeds the fund. There can be no injustice in this view, as the appellee receives the benefit of the money when it is credited upon his debt. *South Park Commissioners v. Todd*, and *Union Mut. L. Ins. Co. v. Slee*, *supra*.

It is said, however, that the mortgagees, not having been made parties to the condemnation proceeding, did not have their day in court, and had no hearing upon the question as to what was a just compensation to be paid by the railroad company. This is true, and the mortgagees are still entitled to such hearing; they are not bound to accept \$17,500 as the exact and whole amount to be paid by the company without a chance to be heard upon that subject, either in a proceeding by the company to condemn their interest or otherwise. *Mills*, Em. Dom. § 74; *Lewis*, Em. Dom. § 324; *Wilson v. European & N. A. R. Co.*, 67 Me. 358. But are they not fully protected in this regard by the decree of the circuit court? By the terms of that decree they are authorized to receive the \$17,500, and have it credited upon their debt, and, if the balance of the debt is not paid, and they are obliged to resort to a foreclosure, they are further authorized to have a revaluation of the land taken, and a redetermination of the damages to the land not taken, either by an issue out of chancery, or by some proceeding of their own selection; and, should the amount of a just compensation be thereby found to exceed \$17,500, to have the excess applied upon the mortgage. It is claimed, however, that the decree is erroneous, under the doctrine laid down in *Insurance Co. v. Slee*, *supra*, where it was said that proceedings to condemn property under the eminent domain act are legal, and not equitable, and that it would be inconvenient for a court of equity to remit the matter of condemnation to a court of law for trial according to the rules and practice in trials at law. The statement thus made in the *Slee* Case is correct as a general proposition, and as applicable to the facts of that case; but it can have no application to the circumstances of the present case, as will appear from a brief examination thereof. Here the decree directs that, in case of a foreclosure of the mortgage, the property mortgaged shall be sold in the inverse order of alienation, treating the taking of the strip of land condemned by the company as an alienation. It is certainly in accordance with equitable principles that the balance of the mortgaged land be sold first, before resorting to the strip taken for

Decree of
circuit court
sustained.

railroad purposes. But it appears from the evidence in this case that the appellant company has taken possession of the strip of land condemned by it, and has improved it, and built its right of way upon it, and is using the improvements. If upon foreclosure the debt is not paid by the sale of the rest of the mortgaged land, how is the lien to be enforced against the strip thus taken and improved? Shall the right of way be sold with the railroad tracks and other improvements upon it? Ordinarily, fixtures placed upon mortgaged premises by the mortgagor become a part of the realty, and inure to the benefit of the mortgagee by increasing his security. But it has been held that, in such a foreclosure as that now under consideration, the holder of the mortgage ought not to be allowed to sell the road, track, superstructure, and fixtures, placed upon the land at great expense by the railroad company, for the reason that the public has an interest in the successful operation of the road, and that, therefore, equity only requires the company to make compensation by paying the value of the land at the time it was taken, and interest on that amount. *Kennedy v. Milwaukee & St. P. R. Co.*, 22 Wis. 581; *Aspinwall v. Chicago & N. W. R. Co.*, 41 Wis. 474; *Wooster v. Sugar River V. R. Co.*, 57 Wis. 311, 10 Am. & Eng. R. Cas. 499; *Wilson v. Railway Co.*, *supra*. Hence some method must be adopted of ascertaining what the value of the land condemned was at the time when it was taken, exclusive of the value of the improvements placed upon it by the railroad company since that time. It would seem that the proper method to be adopted for such purpose is the statutory method, or that prescribed by the eminent domain act for ascertaining the amount of compensation. *Kennedy v. Milwaukee & St. P. R. Co.*, *supra*.

The decree of the circuit court in the case at bar conforms to the rule thus laid down in the Wisconsin cases, and may be regarded as correct, so far as it has reference to the value of the strip of land taken. To what extent is it correct in requiring the amount of damages to the portion of block B not taken to be ascertained, and the excess thereof, if any, over the damages found by the jury in the condemnation proceeding, to be applied upon the mortgage debt? The verdict in that proceeding showed, separately, the value of the part of the block which was taken, and the damages to the part thereof not taken. The judgment also refers to the total amount as being for both value and damages. After the court of chancery has directed an issue at law to be tried to ascertain the value of the land taken exclusive of the improvements upon it, it could easily be determined at the same time, as an incident to such issue, what were the damages to the land

not taken at the time of the condemnation. As such damages had the effect of lessening the value of the land subject to the security of the mortgage, it would be equitable to credit them upon the mortgage debt. But if the decree is erroneous in directing such damages to be ascertained, and the money now in the hands of the county treasurer is paid to the appellee, Brown, how are the mortgagees to receive the benefit of the damages in the event of a foreclosure? This is not a case where the condemnation money has already been paid to the mortgagor. The present bill was filed, and an injunction was obtained, while the money was yet in the hands of the county treasurer. If the money is paid to Brown, then when the foreclosure takes place the mortgagees will sell the land damaged, but not taken, at its reduced value. If there is no way under the foreclosure proceeding to ascertain the damages, and require the payment of the same, then the mortgagees will be remitted to their action at law against the railway company or Brown, the mortgagor. In *Wilson v. European & N. A. R. Co.*, *supra*, where the mortgagee was not made a party to the condemnation proceeding and the condemnation money was paid to the mortgagor, the mortgagee was allowed to maintain trespass against the railroad company. Consequently, if the decree of the circuit court is erroneous in the particular now under discussion, it is difficult to understand why Dale or Drexel & Co. should object to it. It is favorable to them, in that it gives them a chance to show, if they can, that the value of the land taken was greater than \$4,600, and that the damages to the land not taken were more than \$12,900, and gives them the benefit of the excess, if excess there is. The mortgagees, however, are not objecting to the decree. Decree *pro confesso* was rendered against them. They assigned no errors in the appellate court. They have assigned no cross errors here. It does not lie in the mouth of the appellee Brown to object to the decree, so far as it provides for the proceedings under the foreclosure hereafter to be had. The judgment already rendered in the condemnation suit is binding upon him. He was a party to that suit, and introduced evidence upon the trial of it. He is estopped from denying that the sum of \$17,500 is just compensation for the value and the damages. His assignments of error merely question the justice of the decree, in so far as it orders the money now in the county treasurer's hands to be paid to the mortgagees, and not to himself. As we hold that the money should be applied upon the mortgage debt which he owes, it is unnecessary to indulge in any further discussion as to those features of the decree which concern the mortgagees only. It follows from the views here

expressed that the judgment of the appellate court must be reversed, and the decree of the circuit court affirmed. It is accordingly so ordered.

Condemnation of Mortgaged Property.—See note 30 Am. & Eng. R. Cas. 435; *Schermerhorn v. Peck* (Kan.), 44 *Id.* 219.

Land Subject to Separate Mortgages—Single Award in Favor of Landowner.—Where different parcels of land through which a railroad passes are subject to separate mortgages, a railroad company condemning a right of way, cannot complain of a single award in favor of the landowner, since the distribution of the money between the mortgagees is a question which does not concern it. *Chicago, M. & St. P. R. Co. v. Baker*, 102 Mo. 553.

Misjoinder of Causes of Action for Injuries to Land Owned by Different Parties.—In the trial of an action on an appeal from the award of commissioners, in a railroad right-of-way case, a cause of action for injuries to lands owned by M. W. by reason of the appropriation of the right of way cannot be joined with an action for injuries to lands owned by M. W. and S. W. jointly. In such a case it is error to overrule a demurrer to the petition which avers the misjoinder as the reason thereof. *Leavenworth, N. & S. R. Co. v. Wilkins*, (Kansas, March 7, 1891,) 26 Pac. Rep. 16.

Party must Show Interest in Land before He is Entitled to Recover.—Where commissioners in a railroad right-of-way proceeding award damages for injuries to a tract of land to a certain land and cattle company as the owner thereof, and also allow nominal damages to another party for injuries to the same land, and the latter appeals from such award to the district court, before he can recover damages in said court he must show that he had some interest in the land over which the right of way was condemned, at the time of the condemnation proceedings. *Chicago, K. & W. R. Co. v. Easley*, (Kansas, May 9, 1891,) 26 Pac. Rep. 731.

Same—Sufficiency of Title by Adverse Possession.—Disputed possession of land under a claim of title for many years is sufficient to maintain a petition under the Pub. Sts., chap. 112, § 95, for the assessment of damages caused by the taking of the land by a railroad corporation. At the trial of a petition for the assessment of damages caused by the taking of land, consisting of beach and upland for a railroad, there was evidence as to the beach that it had been treated for many years as a part of the petitioner's estate; that no one else had ever claimed it or damages for the taking thereof; and that the railroad corporation in its location and plans had always described it as belonging to the petitioner. The evidence of an adverse occupation of the upland by the petitioner for twenty years was clear; and no attempt was made by the respondent to distinguish the beach from the upland. *Held*, that the jury might properly find an adverse possession of the beach for twenty years. *Andrew v. Nantasket Beach R. Co.* 152 Mass. 506.

Receivers as Parties to Action to Try Title to Land.—Where receivers of a railroad company are appointed after the commencement of an action against such company to try title to land occupied by it, they are proper parties to such action. *San Antonio & A. P. R. Co. v. Ruby*, (Texas Sup. Ct., March 10, 1891,) 15 S. W. Rep. 1040.

Action by Executrix to Recover Damages to Her Estate.—One who sues as executrix of her husband's estate is not entitled to recover damages from a railroad company, which has condemned a right of way and built its road through testator's land, for building and repairing necessary fences in the future, where she makes no profert of her letters testamentary, and does not introduce a copy of the will to show how long she is entitled to hold the land as executrix. *Chattanooga, R. & C. R. Co. v. McLandon*, (Georgia, Jan. 14, 1891,) 12 S. E. Rep. 941.

JACKSONVILLE, TAMPA, & KEY WEST R. CO.

v.

ADAMS.

(Florida Supreme Court, March 4, 1891.)

Eminent Domain—Notice to be Given by Commissioners—Jurisdictional Defect.—The notice prescribed by chapter 3595, Laws Fla., 1885, to be given by the commissioners appointed to view the premises and appraise the lands to be taken in condemnation proceedings for right of way for a railroad company, in the absence of the personal appearance of the landowner, is indispensable, and the requirement of the statute in this respect is jurisdictional, and cannot be disregarded.

Same—An Action of Ejectment can be Maintained Against a Railroad Company to recover possession of a roadbed in use by the company, where the same has been taken without the consent of the owner, and without authority of law.

APPEAL from Volusia Circuit Court.

J. R. Parrott, for appellant.

A. W. Cockrell & Son, for appellee.

MABRY, J.—The appellee as administrator *de bonis non cum testamento annexo* of the estate of John S. Adams, deceased, instituted a suit of ejectment on the 10th day of March, 1887, in the circuit court of Volusia county, Fla., against the appellant corporation to recover a strip of land 100 feet wide, lying 50 feet on each side of the center of the roadbed maintained and operated by the said corporation in the W. $\frac{1}{4}$ of section 13; all of section 14; E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$; and S. E. $\frac{1}{4}$ of section 15, all in township 19 S., range 32 E., situated in Volusia county.

The declaration alleges that the defendant corporation in the court below is in possession of said strip of land, and refuses to surrender possession of the same to the plaintiff below, who, as administrator aforesaid, claims title to same, and also that the defendant corporation has received the profits of said land since the 20th day of April, 1886, of the yearly value of \$5,000. A demurrer was interposed to the declaration by defendant below on the 2d day of May, 1887, and the causes of demurrer assigned are as follows: "(1) That plaintiff's declaration is insufficient in law, for that, from the facts therein shown and set forth, the plaintiff would not be, and is not, entitled to his action; (2) for that the court cannot, in law, grant the relief and right sought by plaintiff against the defendant." This demurrer was overruled by the court, and

on the 1st day of August, 1887, defendant below filed the general issue and three special pleas.

This cause was on the 2d day of February, 1888, referred to E. M. Randall, Esq., as referee, for decision, and on the 19th day of May, 1888, on motion of plaintiff below, the special pleas were stricken from the files by the referee. On the same day the cause was submitted by the respective parties to the referee, who, after hearing the evidence adduced and the argument of counsel, rendered a judgment on the 22d day of May, 1888, in favor of the plaintiff below for the possession of said strip of land, \$180 for mesne profits, and the costs of the suit. On the same day that the judgment was rendered, defendant below, by attorneys, made a motion before the referee to set aside the judgment and grant a new trial, on the following grounds: (1) The verdict or judgment is not supported by the evidence; (2) that the verdict or judgment was not supported by the law; (3) that the verdict was excessive. This motion was overruled by the referee, and defendant below appeals to this court.

The errors assigned here are: (1) The court erred in overruling defendant's demurrer; (2) the court erred in granting plaintiff's motion to strike defendant's pleas; (3) the court erred in refusing a new trial to the defendant. The second ground of error assigned here is expressly waived by appellant, and it is not necessary to devote any attention to it.

The referee did not err in overruling the demurrer of defendant below to the declaration. The declaration is in the form prescribed by the statute in actions of ejectment, and the demurrer admits the averments therein. The appellant seeks to raise, under this assignment of error, the question whether or not an action of ejectment can be maintained to eject a railroad corporation from a right of way after the road has been constructed and put in operation. This question more properly arises in the final decision on the testimony introduced, and, as we duly consider this phase of the case under the motion for a new trial, it is not necessary to notice further this assignment of error.

On the trial before the referee a written stipulation, signed by the respective parties, was introduced, whereby it was agreed that a copy of the proceedings on the part of the Atlantic Coast, St. Johns & Indian River Railroad Company, in Volusia county, Fla., to condemn the land in controversy for right of way for use of its railroad, should be taken as a full and complete transcript of said proceedings, and that the defendant corporation took possession of said Atlantic Coast, St. Johns & Indian

Overruling demurrer.

Stipulated facts.

River Railroad in December, 1885, under a lease for 99 years, and has continued in possession of same under said lease. It is also agreed in said stipulation that, prior to the alleged condemnation proceedings on the part of said Atlantic Coast, St. Johns & Indian River Railroad Company, the title in fee of the land in question had been duly conveyed to John S. Adams; that said John S. Adams died, testate, in April, 1876, and letters testamentary were duly granted on his estate to Ellen F. Adams in June, 1876; that Ellen F. Adams died in June 1878, without making any settlement of said estate, and letters *de bonis non cum testamento annexo* were duly granted to John S. Driggs in July 1878; that said Driggs was duly removed from his office as administrator aforesaid on the 6th day of June, 1885, and no settlement of said estate was had up to the time of his removal; and, further, that plaintiff was duly appointed and qualified as administrator *de bonis non cum testamento annexo* of said estate on June 16, 1885.

It is admitted, then, that prior to the alleged condemnation proceedings the title in fee had been conveyed to plaintiff's testator, and no questions are presented as to the source or deraignment of plaintiff's title. By the settled law of this state an administrator may maintain

**Ejectment by
administrator.**

ejectment to recover possession of the lands

of his intestate, or testator, and this is not questioned by appellant anywhere in the record. It is insisted, however, on the part of appellant's attorney that the land in question had been duly condemned as a right of way for the Atlantic Coast, St. Johns & Indian River Railroad Company, and the appellant has the same right to use, occupy, and possess the land as its lessor had. It is true that appellant has the same rights to the use of the land, ~~for~~ right of way, to the extent of its lease, that the Atlantic Coast, St. Johns & Indian River Railroad Company had, but it is contended by appellee that the proceedings to condemn the land for right of way are null and void and did not divest plaintiff below of his right to the possession of the land. Various objections are

**Condemnation of land—
Failure to
give notice.**

made to the proceedings by which the strip of land in question was sought to be condemned for right of way. We will not notice all the objections raised, because in our opinion there is one which is valid, and renders the condemnation proceedings void. Under the statute, the commissioners appointed to view the premises and appraise the lands to be taken are required to give the owner or the owners of land notice of the time and place where they will meet to consider the amount of compensation to be paid to the owner or owners by the company asking for the condemnation. The statute requires that the

"notice shall be served at least ten days before the time of such meeting, personally on such owner or owners, or on his or their authorized agent or attorney, or by leaving the same or a copy thereof at his residence or place of business, with a person over the age of fifteen years." It also requires that, if the owner of such land is a non-resident of the county, or his residence is unknown, and he has no authorized agent or attorney in the county, such notice shall be published for four consecutive weeks in some paper published in the county, and that proof of the service of such notice in compliance with the requirement of the statute shall be filed with the report of the commissioners. The requirement of the statute in this respect is jurisdictional, and cannot be disregarded. Mills, Em. Dom. § 95; 2 Wood, Ry. Law, § 247; Lewis, Em. Dom. § 369. There is no proof in the record that notice was given as required by the statute, nor is there any recital in the record from which it can be inferred that the notice was so given. If the commissioners had reported that proper notice had been given, or if the judge, in making an order confirming the report, had adjudicated this fact, it might be sufficient; but, as the record does not afford a foundation for such an inference, we express no opinion on these points.

Having reached this conclusion, the only question remaining as to plaintiff's right to recover the land in controversy is, will ejectment lie for a fractional part of a road-bed of a line of railroad in use and operation? The testimony in this case shows that the lessor of defendant below undertook to condemn the land in question by proceedings instituted in August, 1885, and that the road was leased to said defendant in December, 1885. The owners of the land are devisees under the will of John S. Adams, deceased, who died in Duval county, Fla., and on whose estate administration is still continuing. It does not appear that the administrator of said estate or the devisees under the will were present when said road was being constructed. The plaintiff in the court below, who was administrator of the estate at the time the proceedings to condemn the land were instituted, says in his testimony that he had no notice of the institution of these proceedings until some time in 1886. He says he was absent from the state at the time the condemnation proceedings were instituted. But he admits that he had information that the company was occupying the land early in 1885. Will ejectment lie against the defendant corporation under the circumstances of this case? There is no question but that the action could be maintained against an individual defendant under such a state of facts, and the same result will follow in a suit against

Right to
maintain
ejectment
against rail-
road.

the defendant corporation unless an exception can be sustained on the ground of public policy or public inconvenience, or some other just ground. In the case of *McAulay v. Western Vt. R. Co.*, 33 Vt. 311, Chief Justice REDFIELD, speaking for the court said: "In these great public works the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire important interests in its continuance. The party does not of course, lose his claim or the right to enforce it, in all proper modes." This was a suit of ejectment against a railroad to recover land occupied as a right of way. There are many authorities which maintain the proposition that ejectment will not lie against a railroad corporation to recover roadbed after the same is constructed and put in operation. *Railroad Co. v. Turner*, 31 Ark. 494; *Provolt v. Chicago, R. I. & P. R. Co.*, 57 Mo. 256; *Gray v. St. Louis & S. F. R. Co.*, 81 Mo. 126, 22 Am. & Eng. R. Cas. 106; *Omaha & N. W. R. Co. v. Redick*, 16 Neb. 313, 17 Am. & Eng. R. Cas. 107; *Lawrence v. Morgan's L. & T. R. & Steamship Co.*, 39 La. Ann. 427, 30 Am. & Eng. R. Cas. 309. There are cases where courts of equity have refused a writ of injunction to restrain a railroad from operating trains where parties have remained inactive until the road is completed. This doctrine is fully illustrated in our own court in the case of *Pensacola & A. R. Co. v. Jackson*, 21 Fla. 146.

The principle of estoppel can be invoked in suits of this character, as well as in others, and, where a party have so acted as to call for the application of this doctrine, it will apply. We do not think, however, that the plaintiff is estopped in this case from asserting his title to the property, and after a consideration of the authorities, we think, both upon principle and the weight of authority, an action of ejectment may be maintained against a railroad corporation to recover possession of a roadbed, where the same has been taken without the consent of the owner, and without authority of law. *Hooper v. Columbus & W. R. Co.*, 78 Ala. 213, 29 Am. & Eng. R. Cas. 540; *Smith v. Chicago, A. & St. L. R. Co.*, 67 Ill. 191; *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178; *Graham v. Columbus & I. C. R. Co.*, 27 Ind. 260; *Robinson v. Pittsburg R. Co.*, 57 Cal. 417; *White v. Wabash, St. L. & P. R. Co.*, 64 Iowa, 281, 17 Am. & Eng. R. Cas. 82; *Conger v. Burlington & S. W. R. Co.*, 41 Iowa, 419; *St. Joseph & D. C. R. Co. v. Callender*, 13 Kan.

496; *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655; *Pittsburg & L. E. R. Co. v. Bruce*, 102 Pa. St. 23, 10 Am. & Eng. R. Cas. 1; *International & G. N. R. Co. v. Benitos*, 59 Tex. 326, 10 Am. & Eng. R. Cas. 122; *Sherman v. Milwaukee, L. S. & W. R. Co.*, 40 Wis. 645; *Mills*, Em. Dom. § 90; *Pierce*, R. R. 167; 2 Wood, Ry. Law, § 246.

The appellant says the verdict for mesne profits were excessive. The only testimony on the subject of mesne profits was that of plaintiff and J. R. Parrott, Esq. No objection was made in the court below to the character of the evidence introduced, and while it is very uncertain, yet I see no ground for disregarding it. It was sufficient upon which to base a judgment by the referee, and, under the rules governing such findings, I do not see how it can be disturbed. On appeal, his findings of fact are to be given the same consideration and weight as would be given to the verdict of a jury. *Broward v. Roche*, 21 Fla. 465; *McClenny v. Hubbard*, 20 Fla. 541.

In our investigation of this case we find that some decisions seem to hold in cases of this kind that the writ of possession will be stayed a reasonable time for the consummation of condemnation proceedings to secure a right of way for the railroad company. Without deciding the point, we will say that, if such an application is desired, it must be made within 30 days from the filing of this opinion.

Judgment affirmed.

Eminent Domain—Notice of Proceedings.—See *ex parte Reynolds*, (Ark.), 44 Am. & Eng. R. Cas. 60; *Rio Grande & E. P. R. Co. v. Ortiz*, (Tex.), 44 *Id.* 67; *Cory v. Chicago, B. & K. C. R. Co.* (Mo.), 44 *Id.* 183; *Huling v. Kaw Valley, etc. R. Co.*, (U. S.), 39 *Id.* 52; *Ackerman v. Huff*, (Tex.), 36 *Id.* 589; *St. Paul, M. & M. R. Co. v. Minneapolis*, (Minn.), 24 *Id.* 309; *Kanne v. Minneapolis, etc. R. Co.*, 23 *Id.* 127; *Birge v. Chicago, M. & St. P. R. Co.*, (Iowa), 20 *Id.* 291, note 293; *Tracy v. Elizabethtown, etc. R. Co.* (Ky.), 14 *Id.* 407.

Ejectment Against Railroad Companies.—See note 22 Am. & Eng. R. Cas. 126.

Same—Adverse Possession Under Color of Title—Defective Condemnation Proceedings.—In *Cogsbill v. Mobile & Girard R. Co.* (Ala. June 15, 1891), 9 So. Rep. 512, it was held that where in ejectment against a railroad company, defendant claims by adverse possession under color of title, consisting of defective condemnation proceedings, actual possession of a part of the tract is to be regarded as actual possession of the entire tract described in the condemnation proceedings; and this although plaintiff was not paid for the land, and had no notice of the proceedings.

MINER

v.

NEW YORK CENTRAL & HUDSON RIVER R. Co.

(123 *New York*, 242.)

Right of Way—Duration of Easement Acquired—Expiration of Company's Charter Period—Effect of Consolidation.—A railroad company having a charter limiting the period of its existence to fifty years, and having authority to condemn lands "necessary to its own use," does not have the estate which it acquires in lands appropriated, limited to the term of fifty years. The land is taken for perpetual use for railroad purposes; and where the company is consolidated with and merged into another company, which succeeds to its rights and franchises and operates its road, the right of way so acquired does not determine and revert to the landowner at the end of the time for which the original company was chartered.

Same—Consolidated Company Acquiring Title by Adverse Possession.—Conceding that a right of way acquired by a railroad company, the existence of which is limited by its charter to a period of fifty years, expires with the life of the corporation, yet if it appears that the original company was dissolved by merger into a new company which has operated the road for more than twenty years, such new company has acquired the right of way by adverse possession.

APPEAL from Supreme Court, General Term, Fifth Department.

L. N. Bangs, for appellant.

Daniel H. McMillan, for respondent.

EARL, J.—The Tonawanda Railroad Company was incorporated by the act, chapter 241 of the Laws of 1832, to construct and operate a railroad from Rochester, in the county of Monroe, to Attica, in the county of Genesee. The first section declares that certain persons named and others should be, and for the term of 50 years from the passage of the act should continue to be, a body corporate and politic. Section 15 provides that, in addition to the general powers given by the Revised Statute to corporations, the Tonawanda Railroad Company should have certain specified powers, among which was the power "to enter upon any of the lands lying within the contemplated range of the said railroad for the purpose of examining, surveying, and establishing its lines." Section 16 provides: "In case the corporation shall not be able to acquire the title to the lands within which said railroad shall be laid,

Case stated—
Statutory
provision.

by purchase or voluntary cession, it shall be lawful for the said corporation to appropriate so much of such lands as may be necessary to its own use, for the purposes contemplated by this act, on complying with the provisions of the six following sections." Section 17 provides that the directors may present a petition to the vice-chancellor setting forth by some proper description "the lands which are wanted for the construction of said railroad, * * * and praying for the appointment of appraisers to assess the damages which the owners of said lands will severally sustain by reason of the appropriation thereof by the said corporation to its own use." Section 20 provides that appraisers shall proceed "to ascertain and assess the damages which each individual owner will sustain by the appropriation of his land for the use or accommodation of such railroad or its appendages." Section 21 requires they shall report, specifying the damages which the owners of the respective parcels will sustain, "by reason of the appropriation of the same for the purpose aforesaid." Section 22 provides that, on payment of the damages thus assessed, "the corporation shall immediately become entitled to the use of the said lands for the purposes aforesaid." Section 28 provides that "if the legislature of this state shall, at the expiration of ten, and within fifteen, years from the completion of said railroad, make provision by law for the repayment to the said company of the amount expended by them in the construction of said railroad, together with all moneys expended by them for permanent fixtures for the use of said railroad, with interest on such sums at the rate of fourteen per cent. per annum, together with all moneys expended by such company for repairs, or otherwise, for the purposes of said road, after deducting the amount of tolls received by such road, then the said railroad, with all fixtures and appurtenances, shall vest in, and become the property of, the people of this state." And the last section provides that the legislature might, at any time alter, modify or repeal the act. By the act, chapter 236 of the Laws of 1850, the Tonawanda Railroad Company, and the Attica & Buffalo Railroad Company were authorized to consolidate into a single corporation, and, when consolidated, the two corporations were to be merged into the new corporation. Section 4 of the act provides that all and singular the rights and franchises of the companies "and all and singular the rights and interests of the said two corporations, in and to every species of property, real, personal, and mixed, and things in action, shall be deemed to be transferred to, and vested in such new corporation, without any other deed or transfer, and such new corporation shall hold and enjoy the

same, together with the right of way, and all other rights of property, in the same manner, and to the same extent, as if the said two corporations above mentioned, should have continued to retain the title, and transact the business of such corporations, and the title and real estate acquired by either of said two corporations shall not be deemed to revert, or be impaired by means of anything in this act contained." By proceedings taken under the act in the same year, the consolidation was effected, and the new corporation took the name of the "Buffalo & Rochester Railroad Company." Under the act, chapter 76 of the Laws of 1853, the Buffalo & Rochester Railroad Company and other railroad companies were consolidated, and the New York Central Railroad Company thus formed; and section 4 of that act is the same as section 4 of the prior act. Pursuant to the act, chapter 917 of the Laws of 1869, the New York Central Railroad Company and the Hudson River Railroad Company were consolidated, and the defendant was thus formed. Section 4 of the act provides that "all claims, demands, property, rights of way, and every other interest, shall be as effectually the property of the new corporations as they were of the former corporations, parties to the said agreement and act; and the title to all real estate, taken by deed or otherwise under the laws of this state, vested in either of such corporations, parties to said agreement and act, shall not be deemed to revert, or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation." Under these acts, the land in question has been continuously used and occupied by the successive railroad companies for railroad purposes.

**Plaintiff's
contention.**

It was taken by condemnation proceedings, under the act of 1832, and the claim of the plaintiff is that only its use was taken for 50 years,—the chartered life of the Tonawanda Railroad Company,—and that, at the expiration of that term, the use terminated, and the land reverted to him as the successor in title. The ingenious and vigorous argument of his counsel has failed to convince us that this action is maintainable. It is conceded that the Tonawanda Railroad Company did not acquire a fee simple in

**Duration of
the easement
acquired.**

the land taken by it, under the act of 1832. Both parties claim that it acquired an easement in the land, but they differ as to the duration of the easement, the contention of the defendant being that it took a perpetual easement for railroad purposes. It took and paid for all the estate it was authorized to take under the act, and we must therefore look to the act to see what estate the legislature intended might be taken. In our efforts to

arrive at the legislative intent, we must not only scrutinize the language used, but keep in view the purposes to which the land was to be devoted. The land was to be taken for a permanent public use. It could not have been understood or expected that the railroad should be operated for the accommodation of the public for 50 years, and that then, after the necessity for it had been greatly increased, it should disappear. While the life of the corporation was limited to 50 years, it could not have been expected that it should really cease to exist at the end of that period. While the legislature reserved the right to cut its life short, it also had the power to extend it. It is the experience of mankind that such *quasi* public corporations never come to an end by mere effluxion of time. A railroad corporation which had, during 50 years, rendered a public service, and properly discharged its corporate functions would, with the passage of years, become more and more useful and more and more a necessity. Could it have been the legislative intention that, at the end of 50 years, the lands taken under the act, with the railroad embankment, ties, culverts, bridges, buildings, and other structures, so far as they had become fixtures, should revert to the original owners or their successors in title? Could it have been the intention that, at the end of 50 years, any new or reorganized company could use and operate the railroad only by a new appraisal of damages, which might include, and would probably have to include, the value of the land, with a complete railroad thereon? It is improbable that the parties who sought the charter, and the legislature which granted it, intended the results claimed by the plaintiff.

There is nothing in the act which limits the use to 50 years, or any other term. The corporation could appropriate only such lands as were "necessary to its own use;" but by this language the estate in the lands appropriated was not necessarily limited to the term of 50 years. The corporation could not appropriate any land not needed for its use, but, when it appropriated an easement in land, how long was the easement to endure? The damages were to be assessed for the devotion of the land to railroad purposes, and an easement was to be taken for such purposes; and that easement was to be paid for by the corporation, and to become its property. Such property it could by authority of law sell, lease, or mortgage, as it could its other property, and the easement would continue, so long as it was needed for the purposes of the railroad by whomsoever owned, for which it was appropriated. The legislature reserved the right to alter or modify the charter, and thus the life of the corporation could be extended. In such an event was it intended

that there should be a new appropriation of the land, and a new appraisal of damages, greatly enhanced by the construction of the railroad before the same railroad company, with its extended charter, could operate its road? By section 28 of the act the people of the state were authorized, by making certain payments, to take this road, when it, with all its fixtures and appurtenances, should "vest in and become the property of the people of this state." It certainly was not contemplated that the people should make the payments, and then obtain a title limited by years, which would inevitably pass away from them at the end of the 50 years. Was it within the legislative contemplation that the people would be obliged, in order to operate the road in the public interest, to again appropriate the land with a complete railroad thereon, and thus again pay for the railroad? We are thus brought to the conclusion that the legislature did not intend, in the act of 1832, to limit to the term of 50 years the easements acquired in lands thereunder, and that such easements by the successive consolidation acts and agreements became

Contemplation of possible reverter.

vested in the defendant. There is nothing in the claim of the plaintiff that the damages of the landowner were appraised upon the assumption that an easement for 50 years only was taken. It is believed that a possible reverter of the land is never contemplated in the assessment of damages in such cases, and that the appropriation is regarded as permanent, and the damages are awarded upon that basis. *Wood, Ry. Law*, 767; *Troy & B. R. Co. v. Lee*, 13 Barb. (N. Y.), 169; *Canandaigua & N. F. R. Co. v. Payne*, 16 Barb. (N. Y.), 273; *In re Union Village & J. R. Co.*, 53 Barb. (N. Y.), 457; *In re Utica, C. & S. V. R. Co.*, 56 Barb. (N. Y.), 456; *In re New York Cent. & H. R. R. Co.*, 6 Hun (N. Y.), 149; *In re Prospect Park & C. I. R. Co.*, 13 Hun (N. Y.), 345. No other basis would be practicable, as the chartered life of the corporation might be curtailed or prolonged, and a possible or distant reverter could not well be taken into the account in the estimate of damages. If, therefore, this action could prevail, a landowner might receive and enjoy the full value of his land damages for 50 years, and, at the end of that time, have his land again enhanced in value by a railroad thereon. But if we are wrong in the views thus far expressed, as to the estate in the land appropriated, only one other view may be taken with any plausibility, and that is that the easement was taken for the use of the corporation during its corporate life. There is very little reason for saying that it was taken for an absolute term of 50 years. Then it was taken for the use of the corporation, and, when it ceased to exist, the use could

not be prolonged. The corporate life came to an end in 1850, at the time of the first consolidation. The new corporation took the place of the two corporations, and they then passed utterly out of existence. Boone, Corp. § 185; Wood's Field, Corp. § 545, 547, 554, 667; *Shields v. Ohio*, 95 U. S. 319; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359. From 1850 to the commencement of this action, more than 30 years, this land was held and possessed under a claim of right, adversely, by the defendant and its predecessors in the title. During the first 20 years of that time, unless a perpetual easement for railroad purposes was originally taken, the possession was wrongful, and the owners of the fee could have re-entered, or brought ejectment. That, under such circumstances the action is barred by adverse possession, is free from doubt. Our conclusion, therefore, is that the judgment should be affirmed, with costs.

Title by adverse possession.

LYON

v.

MCDONALD.

(78 Texas, 71.)

Eminent Domain—Condemnation for Depot Grounds—Fee or Easement.—Where lands are condemned by a railroad company for depot and station grounds, the company does not take a fee, although the statute authorizing the appropriation of land for such purposes is silent as to the fee, and the statute authorizing the appropriation of a railroad right of way expressly reserves the fee to the owner.

Same—Permitting Third Party to Use Premises—Remedy of Landowner.—A railroad company has no authority to permit a particular person, not the owner of the fee, to use land condemned by it for station purposes, for the purpose of receiving freight and storing the same, and erecting sheds for the protection of his property, and using the premises as a place of business. If it does so, this will constitute a change of the use of the premises to private purposes, and will amount to an abandonment, and the owner of the fee will be entitled to recover as damages the rental value of the premises, for the purposes for which the company permitted them to be used.

Use of Premises Condemned by Owner of the Fee Owning Adjacent Lot.—Although the owner of the fee in premises condemned by a railroad company for station grounds and depot purposes owns a lot adjacent to such premises, this gives him no right of passage over the railroad grounds, except at public crossings.

Action for Obstruction of View—Cause of Action.—A petition which merely states that a view is obstructed from one place to another, without showing what benefit or advantage there was in such view, or what damage results from the obstruction, does not state a cause of action.

Action to Recover Land—Superiority of Plaintiff's Title—Decree by Consent.—In an action to recover land a decree was entered by consent by

plaintiff. *Held*, that it will be presumed that the plaintiff had a superior title at the time the action was begun, although it did not appear on what title he recovered.

COMMISSIONERS' decision. Appeal from Hill County District Court.

Foster & Wilkinson, for appellant.

W. L. Booth and *B. D. Tarlton*, for appellee.

COLLARD, J.—Appellant contends that where lands are condemned by right of eminent domain, under the statute for depot and station grounds for railroad purposes, the fee is taken. We think the fee remains with the original owner. *Mills*, Em. Dom. §§ 58, 59, 208; 2 *Wood*, Ry. Law, 770, 771, and note 2; *Lance's Appeal*, 55 Pa. St. 24; *Pierce*, R. R. 159, 160; *Heard v. City of Brooklyn*, 60 N. Y. 242; *Strong v. City of Brooklyn*, 68 N. Y. 1; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 28. Articles 4210, 4211, and 4212 of the Revised Statutes refer to lands acquired by purchase by railroad companies, and are not applicable to the question before us. We are not called on at this time to construe these articles. They authorize a railway company to sell lands voluntarily conveyed to it, when no longer required for use by the company. It does not follow from this that it could sell or own a fee in lands condemned for its uses; nor that it could sell the fee when the fee was not conveyed to it. It is provided by statute of this state, enacted February 7, 1861, and re-enacted in the Revised Statutes, art. 4206, that the right of way secured to a railroad in the manner provided by law, that is by condemnation, shall not be so construed as to include the fee; but it cannot be argued from this that land condemned for depot grounds passes the absolute fee simple estate. The act allowing a railway company to take land from the owner for depots, machine shops, or material thereon, for the purposes of its incorporation, was passed in 1876. It would not be reasonable to conclude that, because it was silent as to the fee, it was intended the fee should pass, merely because the act of 1861, then in force, reserved the fee to the owner in case of condemnation of the right of way. The reason is on the other side. Rev. St. arts. 4179, 4206.

It becomes necessary to know what use the defendant by permission of the railway company put the vacant depot grounds to, in order to ascertain whether the owner's rights in the fee were interfered with or not. The agreement of the parties and the findings of the court furnish us the facts in this respect as follows: "About the 15th of February, A. D. 1882, the defend-

Fee not acquired in land condemned.

Use to which company put premises.

ant, O. T. Lyon, who was an extensive dealer in lumber and building materials, and shipper of same in large quantities over the said railroad, was permitted by said Missouri Pacific Railroad Company to use a portion of the premises so condemned for depot grounds, but not immediately needed, the same being south of the depot, and immediately adjoining its side track, for the purpose of unloading and storing lumber shipped to him over its railroad. The permission given was verbal, and for no particular time, and no rent or compensation was promised or to be paid, the permission given being for the accommodation of both parties, and no compensation being received or required by the said railroad company, except the increased convenience and facility afforded for the unloading of its cars of lumber, and the avoidance of delay in such unloading by reason thereof. Defendant has ever since continued to occupy on the same terms a portion of said grounds, about 300 feet north and south, and 70 feet east and west, west of and adjoining the side track of said railroad, by unloading and piling lumber thereon from the cars of said railway company, and loading the same therefrom on the wagons of purchasers as sold, and adjoining the west line of said track has erected an office 16 by 16 feet, and a shed 220 feet long, for sheltering dressed lumber. The number of car loads of lumber received and unloaded there during the first 10 months was 347, and during the 12 months following 261 cars, and defendant has been constantly receiving and selling lumber during the time he so occupied, and, by being permitted to unload and store lumber on these grounds, defendant has been enabled to receive and unload the cars of said railway company more rapidly than he could if compelled to haul the lumber to a yard in some other place, and thereby said railroad company has avoided much delay of its cars for unloading."

The meaning of this is that the railway company permitted Lyon to use its grounds as a lumberyard for his private business as a lumber dealer, the company being benefited thereby only in having its cars more conveniently unloaded of lumber hauled there for him. It was an exclusive license to him alone, and not to the public generally, that he should carry on his trade of lumber dealer on grounds condemned for depot purposes. The company would certainly have had the right to permit the public to so use the grounds in unloading its cars, and in receiving freight; but the permission here was to a particular person to so receive his freight bought and sold in his business, to store the same on the grounds, to erect sheds for the protection of his property,

Company cannot allow particular person to use premises.

and to use the premises as a place of business. Such uses were inconsistent with the purposes for which the land was condemned, as much so as if it had been used as an ordinary warehouse or grocery store. It has been held that a railway company might grant a license for the erection and use of buildings on its right of way for convenience in delivering and receiving freight. *Grand Trunks R. Co. v. Richardson*, 91 U. S. 468. And it has been held that where "the premises were occupied as a station, furnishing food, lodging, horse keeping, and horse hire, and allowing buildings upon it to be used for a boarding house and a stable, and some of the land to be cultivated, all for the convenience of passengers and others, in order to increase the business of the road," such uses "were incident to its business as a passenger carrier, and consistent with its occupation for the purposes for which the land was taken, and with a claim to occupy for those purposes." *Pierce v. Boston & L. R. Corp.*, 141 Mass. 481, 27 Am. & Eng. R. Cas. 359. The doctrine was applied in the foregoing case to show that such an occupation and use would not dis seize the owner of the fee, and entitle him to recover the premises because of improper use. These cases, however, do not go the extent of holding that to use the premises taken for warehouses, shops, trades, etc., by private persons, it would not amount to such an abandonment by the corporation of the easement as would give the owner of the fee a right to damages for such use. If the doctrine could be stretched to this extent, there would be nothing to prevent a railroad corporation from having its right of way, and all its grounds not in use, occupied by warehousemen, storekeepers, and all kinds of traders, they paying rent therefor, and plead as an excuse that it was more convenient to the company in receiving and delivering freight. The correct doctrine is laid down in *Lance's Appeal*, 55 Pa. St. 25, where it is said "that the right of the commonwealth to take private property without the owner's consent exists in her sovereign right of eminent domain, and can never be exercised but for a public purpose, supposed and intended to benefit the public, either mediately or immediately. The power arises out of that natural principle that private convenience must yield to public wants. The public interests lie at the basis of the exercise of the power, or it would be confiscation and usurpation to exercise it. This being the reason for the exercise of such power, it requires no argument to prove that, after the right has been exercised, the use of the property must be held in accordance with and for the purposes which justified its taking. * * * Hence it is that no one can pretend that a railroad company may build private houses and mills, or erect

machinery not necessarily connected with the use of their franchise, within the limits of their right of way." It was also held in the case that the "fee remained with the owner, and outside of the authorized use which must be public, or incidental to public use, the proprietary right is in the original owner." The right of eminent domain does not extend beyond "the reasonable necessities of the corporation in the discharge of its duties to the public." *In re New York Cent. & H. R. R. Co.*, 77 N. Y. 248. A railway may take private property upon compliance with the statute, paying the damages assessed for railroad purposes, or it may permit others to do so, but for no other purposes. It cannot take more land than is allowed by the law or its charter, or any except for the legitimate purposes of its franchise. *Railroad Co. v. McLanahan*, *supra*. If it acquire the right of easement for public purposes and its own necessities, by proceedings of condemnation, and change the use to private purposes, such change will amount to "an abandonment," and the owner will have his remedy. It was decided in *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 8, that a change of use to purposes of rent to persons engaged in business of their own "did not put an end to the right of use for the legitimate purposes of the franchise," and authorize a writ of entry by the owner, but that, in such form of action, the owner could establish his right to the fee, and recover mesne profits for the use of it. *Id.* These questions were discussed in the case of *Odneal v. City of Sherman* (Tex.), 14 S. W. Rep. 31, (decided at the present term by the commission of appeals), and the following principles clearly announced: (1) That the fee continues in the owner after land is condemned for public uses; (2) "where land is condemned for a special purpose on the score of public utility, the sequestration of the land is limited to that particular use; and (3) if the property be put to a wholly different use, though for public purposes, a new assessment will be required. In the case before us, it is impossible to say that the railroad could have used the premises in question as a wagon yard under the right of easement, and it is equally certain that what it could not do itself it could not license another to do. Appellant contends that the court erred in finding that plaintiff was entitled to recover as damages the rental value of the premises as a lumber yard. We have already seen that mesne profits may be recovered in such cases. *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 8; *Odneal v. City of Sherman*, *supra*; and *Sedg. Dam.* 251. The land was used as a lumber yard, and the value of such use would be the correct inquiry on the subject of damages, there being no injury to the realty.

Plaintiff's
right to dam-
ages.

Appellant also contends that "the court erred in finding that plaintiff was the owner of the fee during the time the premises had been used by defendant, and especially in finding that he was such owner prior to the 2d day of March, 1883, (the day plaintiff recovered judgment for the land against the heirs of Johns), and in awarding him damages for injury to his rights as owner of the fee during all that time." The petition alleged that plaintiff was the owner of the premises on the 16th August, 1882, and laid the trespass on that day, which is alleged to have been continuous. It is admitted that Thomas Johns, who died in 1867, owned the land (eight acres, including the land in controversy), in 1866; that he had lived with a negro woman in the town of Hillsboro, by whom he had two children, Watson, and Dock Johns; that in October, 1867, eight acres of land, including that in controversy, was set aside by an order of the probate court of Hill county as a homestead to said Watson and Dock; and that on August the 5 and 16, 1882, plaintiff acquired deeds from Watson and Dock Johns. The true white legal heirs of Johns took possession of the eight acres, including the land in controversy, about July, 1879, the same being then unoccupied. The land in controversy was condemned by legal proceedings for that purpose against the real heirs of Johns for depot grounds and right of way in Hillsboro on the 20th day of July, 1881, and on the 25th day of September, 1882, the plaintiff brought suit in the district court of Hill county against the white heirs of Johns to recover the eight acres, and on the 2d day of March, 1883, a decree was rendered by consent in his favor for the land. The negro children could not have inherited the land, and the only right they obtained in the premises was the homestead right granted them by decree of the probate court. They had no fee simple estate, and conveyed none to plaintiff, and by their sale to him the homestead right was extinguished. The record does not show what title he recovered on in the suit against the white heirs of Johns. He did, however, recover the land from them on the 2d of March, 1883, and in favor of this judgment it will be presumed that he had title superior to that of the heirs at the time his suit was brought, to-wit, on the 22d of September, 1882. Their ancestor being the admitted owner, the judgment against them would constitute a link in plaintiff's title, and would invest in him the paramount title to the fee; but it would not in any way interfere with the easement previously acquired by the railroad. This suit is not intended to contest the right of the railway to the easement. We find plaintiff with title to the fee, then, on the 22d day of September, 1882, by virtue

Superiority of
plaintiff's
title.

of his judgment, and not on the 16th day of August, 1882. He was only entitled to the rental value of the fee from the 22d of September, 1882, and not from the 16th day of August, 1882, as found by the court.

Appellant, in his last assignment of error, complains of the ruling of the court in failing to sustain his exceptions to plaintiff's petition as to damages to his lot adjoining the right of way, and in holding defendant liable for damages by reason of obstructing the view of plaintiff from the lot. The petition alleged that plaintiff had the right of free passage through the land occupied by defendant, and by such occupancy he was deprived of this privilege; and that the view from his lot was obstructed by the houses, sheds, etc., erected by defendant. The court sustained the exception to the petition setting up the right of plaintiff to free passage over the grounds; but held the petition good as to the averments of obstruction to the view from the lot. Plaintiff had no right of passage over the grounds of the railway company, and was not entitled to damages because he was deprived of such use. He was not prevented from passing at any public crossing. *Pierce*, R. R. 159, 160. The petition does not show what advantage or benefit there was in such a view, or in what any damage could result by obstructing it. The mere fact that a view is obstructed from one place to another does not of itself import an injury. We think the exceptions to this part of the petition should have been sustained.

Action for obstructing view.

The court's findings of damages on this branch of the case was not only on account of obstructing the view from this lot, but, because of deprivation of use in crossing the railroad grounds, because the lot was valuable, or would be, for a cotton yard; that the proximity of the lumber yard increased the danger of fire to cotton that might be stored on the lot, and enhanced the rate of fire insurance. After sustaining the exceptions to the petition holding that plaintiff had no right to free passage over these grounds, there was nothing left in the petition, upon which the claim for damages vested, but the averment as to obstructing the view. Had this allegation been good, no damage could have been assessed for other injuries not alleged, and it was error to award such damages. Our conclusion is that the judgment of the lower court should be reversed, and the cause remanded.

Landowner's right to cross grounds.

STAYTON, C. J.—Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

Eminent Domain—Right of Railroad Company to Permit Third Party to use Premises Conveyed.—See *Pittsburgh & L. E. R. Co. v. Bruce* (Pa.), 10 Am. & Eng. R. Cas. 1, note 11; *Ross v. Pennsylvania R. Co.* (Pa.), 27 *Id.* 367, note 368.

WILLIAMSPORT & NORTH BRANCH R. CO.

v.

PHILADELPHIA & ERIE R. CO.

(*Pennsylvania Supreme Court, April 6, 1891.*)

Location of Railroad—Effect as to Landowner and as to Rival Corporations.—As against a landowner, a railroad company can acquire only a conditional title by its act of location, which ripens into an absolute title upon making compensation; but as to third persons and rival corporations, the action of the company in adopting a definite location is enough to give it title.

What Constitutes a Legal Location—Preliminary Survey.—An engineer alone cannot locate a railroad so as to give title to the company that employs him; and a preliminary survey made by an engineer which has never been reported to or adopted by the company, does not constitute a legal location of the line of the railroad which will give such company priority over another company which has adopted a line covering a portion of the same territory.

Same—Pleading—When Validity of Location is put in Issue.—In a suit by a railroad company to restrain another company from locating its line over the same land, an answer which denies that the plaintiff company has made a valid and legal location of its line over the same land, puts in issue the validity of the plaintiff's location.

APPEAL from Lycoming County Court of Common Pleas.

The plaintiff, the Williamsport & North Branch Railroad Company, claimed to have located its line over a piece of land known as the "Metzgar Lot," and filed a bill against the Philadelphia & Erie Railroad Company to restrain that company from constructing its road over that piece of land.

Henry C. Parsons, for appellant.

Addison Candor and C. La Rue Munson, for appellee.

WILLIAMS, J.—The important question presented by this appeal is, what constitutes a valid location on the ground of a projected line of railroad? It is singular that such a question should be to any extent an open one in a state remarkable as Pennsylvania is for the number and extent of its railroads. The act of location is an appropriation of private property by virtue of the right of eminent domain, with which the state has invested the railroad company either by the act of incorporation or by virtue of general laws. The requisites of a valid location may be considered, first, with reference to the pri-

Requisites of
valid loca-
tion.

vate owners upon or over whose lands the location is made; and, next, with reference to third parties and other corporations. The successive steps contemplated by the act of 1849 and subsequent legislation, as necessary to vest a title to the roadway in the corporation, are these: *First*. A preliminary entry on the lands of private owners for the purpose of exploration. This is made by engineers and surveyors, who run and mark one or more experimental lines, and who report their work, with such maps and profiles as may be necessary to present it properly to the company that employs them. *Second*. A selection and adoption of a line, or one of the lines, so run, as and for the location of the proposed railroads. This is done by the corporation, and it requires the action in some form of the board of directors. This makes what was before experimental and open a fixed and definite location. It fastens a servitude upon the property affected thereby, and so takes from the owner and appropriates to the use of the corporation. *Third*. Payment to the owner for what is taken and the consequences of the taking, or security that it shall be made, when the amount due him is legally ascertained. The title of the owner is not divested until the last of these steps has been taken. *Levering v. Philadelphia G. & N. R. Co.*, 8 W. & S. (Pa.) 459; *McClinton v. Pittsburg, Ft. W. & C. R. Co.*, 66 Pa. St. 404; *Dimmick v. Brodhead*, 75 Pa. St. 464; *Buffalo, N. Y. & P. R. Co. v. Harvey*, 107 Pa. St. 319, 26 Am. & Eng. R. Cas. 642; *Gilmore v. Pittsburg, V. & C. R. Co.*, 104 Pa. St. 275. As against him the corporation can acquire only a conditional title by its act of location, which ripens into an absolute one upon making compensation. As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title. For this reason, in several of the United States, provision is made by the law for recording the action of the company, and the line adopted by it, so as to give notice to the public, and to settle questions of priority of title. We have no such statute, and the action of the company must be proved by other competent evidence. *Heise v. Pennsylvania R. Co.*, 62 Pa. St. 72. But when proved it has the same effect upon all interested as though it had been recorded. It settles the date of actual appropriation, and shows the exact location of the line of the road proposed. An examination of our own cases will show that the conclusions we have reached are fairly deducible from them. In *New York & E. R. Co. v. Young*, 33 Pa. St. 175, it was held that the location of the line of its road is intrusted by the law to the company alone; and, after it has exercised the discretionary power

When title of
landowner is
divested.

Effect of valid
location.

confided to it, its action is final as to third persons, and cannot be reviewed. The same doctrine was again asserted in *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325, and it has been adopted in many subsequent cases. The effect of a location, when made, so far as the line and the ground covered by it are concerned, was considered in *Pittsburg, V. & C. R. Co. v. Com.*, 101 Pa. St. 192, 10 Am. & Eng. R. Cas. 321; and it was held the act of the company in adopting a definite and permanent location for its road was an appropriation of the ground covered by it, whether such ground was within the inclosure of a private owner, or in the public highway. In other words, this is the method by which the corporation exercises the power of eminent domain with which the state invested it at its creation, and takes what before belonged to others for its corporate use. It may acquire land by purchase, if its charter authorizes it to do so, before a location of its road; but, if it does so, it holds the land as any other purchaser would, subject to the right of any one having the right to do so to enter and appropriate it by virtue of the right of eminent domain. That a corporation cannot exercise the power to appropriate land until it has located its line is well settled. Thus, if a company has an option between two or more lines or routes, it must make its election by an actual adoption of one of them before it can acquire title by an appropriation upon either. 1 Redf. R. R. 240. The reason for this is that the act of location is at the same time the act of appropriation. The space covered by the line as located is thereby seized and appropriated to the purposes of the construction and operation of the railroad by virtue of the power of eminent domain, and nothing remains to be done except to compensate the owner. After the act of location by the company, the owner or the company may proceed at once to secure an ascertainment of damages. Until such act neither can do so, for no right to damages vests in or accrues to the owner until there has been an appropriation of his property by the corporation. *Davis v. Titusville & O. C. R. Co.*, 114 Pa. St. 308, 30 Am. & Eng. R. Cas. 341. There should be no

When location secures priority.

unnecessary delay in completing the preliminary exploration, and making a location, if priority is to be secured. In *New Brighton & N. C. R. Co.'s Appeal*, 105 Pa. St. 13, private parties, in contemplation of securing a charter, caused a preliminary survey to be made over a route for a railroad projected by them. They afterward secured a charter, and the corporation adopted the line of the preliminary survey as the location of its road. In the meantime another corporation had made a preliminary survey over the same ground, and made a final location of its road.

It was held that the latter company had the better title, and that the adoption by the former company of the line run before its incorporation could not carry its title back to the date of the preliminary survey. The application of the rule now laid down, as to what constitutes a valid location, to the case before us, disposes of this appeal. The plaintiff company has the right, under its charter and subsequent legislation, to build its road from its present terminus at Hall's to Williamsport, and connect with the Philadelphia & Erie Railroad. In 1886, and again a year or more before the bill was filed in this case, the engineer of the plaintiff ran over a route from Hall's to Williamsport, connecting with the road of the Philadelphia & Erie Company near the lot described in the bill as the "Metzgar Lot," and set stakes along it. It does not appear in the bill or in the evidence that this preliminary survey was ever reported to the plaintiff company, or that any action was ever taken by the company to fix the location of its road between Hall's and the intersection with the Philadelphia & Erie in Williamsport. In the meantime the latter company, in locating a branch of its road, had run and adopted a line crossing one corner of the Metzgar lot, over which the plaintiff claimed to have made a location by the act of its engineer, and was proceeding to have an assessment of the damages made in the manner provided by law when this bill was filed, and an injunction obtained in the court below restraining the defendant from proceeding further in its effort to perfect its title to the location made for its branch over the Metzgar lot. The answer denied the plaintiff's title in these words: "The defendant denies that the said plaintiff ever made a valid and legal location of the line of its railroad upon the lot of the said John Metzgar." The plaintiff was thus called upon to show the fact of the location of its road upon the land, or upon some part of the land which the defendant claimed the right to occupy under its location of its branch. It did not show, or make any effort to show, the location of the line of its road. When this want of title in the plaintiff was urged upon the attention of the learned judge of the court below, he seemed to recognize its importance as a general proposition, but to think that it was rendered of no consequence in this case by the state of the pleadings. He said: "It is urged by the defendant that there is no evidence that the directors of the plaintiff ever authorized the location of this road. It might be sufficient answer to this allegation to say that there was no such issue raised by the pleadings." But we have seen that it was distinctly raised. The learned master found that the plaintiff's road

Facts of the case.

Issue as to location raised by answer.

had been located by an engineer. He did not find that the company had ever taken any action whatever, either before or after the engineer ran over the route. He could not, from the evidence. An engineer may make explorations in advance of a location, or he may remark the line or adjust the grades after the adoption of a location, but an engineer alone cannot locate a railroad so as to give title to the company that employs him. He is not the company. The right of eminent domain does not reside in him. Until the plaintiff was able to show that it had acquired title to the Metzgar lot, or some portion of it, by the location of its road upon it, it had no standing ground in a court of equity from which to ask an injunction in this case, and it should not have been granted. It sought to restrain the defendant from making an entry on the Metzgar lot, because that lot had been already appropriated by itself to its own corporate uses. The fact on which its right to be heard rested was clearly and flatly denied by the defendant. No effort was made to show it, and without it the plaintiff was without a foundation on which his prayer for an injunction could rest. The decree of the court below is reversed, the injunction is dissolved, and the bill dismissed, at the costs of the plaintiff, the appellee.

Location of Railroad—Rights of Rival Railroad Companies Over Located line.—See *Moran v. Ross*. (Cal.), 39 Am. & Eng. R. Cas. 1; *Barre v. Montpelier & W. R. R. Co.*, (Vt.), 39 *Id.* 17, note 25; *Sioux City, etc. R. Co. v. Chicago, etc. R. Co.* (C. C.), 25 *Id.* 150; *Davis v. Titusville, etc. R. Co.* (Pa.), 30 *Id.* 341; *Rochester, etc. R. Co. v. New York, etc. R. Co.*, (N. Y.), 25 *Id.* 267; *Western, etc. R. Co. v. Georgia, etc. R. Co.*, (N. Car.), 17 *Id.* 28.

PAYNE *et al.*

v.

KANSAS & ARKANSAS VALLEY R. CO.

(*U. S. Circuit Court, W. D. Arkansas, June 22, 1891, 46 Fed. Rep. 546.*)

Injunction—Federal Practice.—The court, in determining the question of granting a temporary restraining order or a perpetual injunction, is governed solely by the laws of congress, the rules of the supreme court regulating equity practice, and the general rules of procedure in equity cases applicable to the equity practice in the courts of the United States.

Jurisdiction of Circuit Court—Federal Question.—The court has jurisdiction of this case because it involves a federal question. The rights of the parties arise under a law of the United States, and involve the construction thereof.

Temporary Injunction—Notice to Adverse Party.—After the passage of the act of congress of 1793, and prior to the act of June 1, 1872, a temporary injunction or restraining order could not be granted without notice to the adverse party. But by the seventh section of the act of congress of June 1, 1872, which is now § 718 of the Revised Statutes of the United States, if a bill is filed for an injunction, and a subpoena issued notifying a defendant to appear on a rule day, and if in the meantime there is danger that irreparable injury may be committed, the court, in the exercise of a sound discretion, will issue a temporary restraining order without notice.

Equitable Jurisdiction of U. S. Courts—Adequate Remedy at Law.—By § 723 of the Revised Statutes of the United States, suits in equity will not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law. This section of the statute is merely declaratory, and made no change in the pre-existing law. It serves merely to emphasize the rule already existing.

Same—Injunction to Prevent Continued Trespass.—If the remedy at law is not as plain, adequate, and complete as one obtainable in equity in case of a continued trespass, the party may prevent the injury by injunction, rather than wait until it is done, and then look for his damages in a court of law. To bar equitable relief the legal remedy must be equally effectual with the equitable remedy as to all the rights of a complainant. Where the remedy at law is not as practicable and as efficient to the ends of justice, and its prompt administration, the aid of equity may be invoked.

Injunction to Restrain Irreparable Damage.—The courts will interfere by injunction to prevent wrongs of a repeated and continued character, but which occasion damages which are estimable only by conjecture, and not by an accurate standard; that this is what is meant by irreparable damages or mischief, when we use the expression in connection with an application for an injunction. If the damage is irreparable, it presents a state of case where the party, in the sense of § 723 of the Revised Statutes of the United States, does not have a plain, adequate, and complete remedy at law; for, if he has such remedy, the damage is not irreparable.

Injunction to prevent taking Private Property without Compensation.—An attempt by a railroad company to build its road upon private property without payment of compensation may be prevented by injunction.

Same—Easement—Unauthorized Use.—The lands taken by defendant in this case were taken *in invitum*, and defendant only acquired an easement to the land, and only such a one as the act of congress authorized. If the use of the lands of plaintiffs for an approach for a wagon road and foot bridge is a use not authorized by congress, and it injuriously affects the lands of plaintiffs, then it is a new and unauthorized use, which, because it injuriously affects their lands, becomes a supervening servitude, which amounts to a taking of their property, and for which taking they are entitled to compensation.

Eminent Domain—When Property can be taken.—Private property, under the constitution of the United States, can be taken for public use only with just compensation.

Purpose of Taking—Extension of Use—Additional Servitude.—A use beyond the purpose of a first condemnation of land by right of eminent domain cannot be included in the first use if not authorized by law to be so included, and such use creates a new servitude if it casts on the land already condemned an additional burden. If such second use affects the value of said land to an extent to which it was not affected by the original taking, then it subjects the land to a new servitude, and there is a taking of private property which has not been paid for.

Market Value as Full Compensation.—When private property is taken for

public use the owner is entitled to full compensation, which means the fair market value of the property at the time of the taking.

Elements of Damage—Peculiar Advantage of Land.—In estimating the value of the lands of plaintiffs, situated as they are shown to be, the fact that they possess peculiar advantages as a site for a ferry landing may be allowed in the estimation of the market value of the land. Plaintiffs have a right to insist on this fact as an element that goes to make up the value.

Additional Use—Construction of Bridge—Additional Compensation.—If the additional use sought to be fastened on the land of plaintiffs by the construction of a wagon and footway bridge by defendant necessarily injures its value as a ferry landing, then there is, for this reason, an additional servitude cast on the land, for which plaintiffs are entitled to additional pay.

When Power of Eminent Domain may be Exercised.—In this case the land condemned under the act of congress of June 1, 1886, could be condemned but for one purpose, and that was for use as a right of way for a railway and a railway bridge. The condemnation of private property for public use must be to subserve the use authorized, and the power of condemnation can only be exercised when expressly granted, or when it exists by necessary implication, and it must be exercised in the manner granted.

Cherokee Nation—Title to Land.—The Cherokee Nation holds the fee to all the lands to which it has title. Individual citizens of the nation have a right of perpetual occupancy in lands improved and occupied by them under the laws of the Cherokee Nation. By this right of occupancy the individual Indian citizen can hold and occupy the lands forever, and fully enjoy all profits arising from them, and their right of occupancy may be transferred by a grant to another citizen of the nation, or it may descend by inheritance. Practically they get all of the productions of the land, and are entitled to its increased or peculiar value as though they held it in fee.

Same—Right to Compensation.—The Cherokee citizen and occupant of land has such a durable and permanent interest in his land as to entitle him to pay for an additional servitude cast on the same.

Eminent Domain—Use of Right of Way for Bridge Purposes—Additional Servitude—Compensation.—The use of lands already condemned for use as a right of way for a railway and railway bridge, for approaches for a wagon and foot passenger bridge, is not a use for railway purposes, and is not one authorized by such first condemnation; and, before the same can be used for approaches for a wagon and footway bridge, if such use in any way casts an additional burden on said land, it must be condemned again by right of eminent domain, and this can only be done when authorized by the legislative power. In this case no such authority exists, either expressly or by necessary implication.

IN EQUITY.

Rogers & Read, for plaintiffs.

Dodge & Johnson, D. W. Jones, and C. B. Moore, (Clayton, Brizolara & Forrester, of counsel,) for defendant.

PARKER, J.—The plaintiffs filed their bill in equity to obtain an injunction against the defendant. They allege that the defendant corporation, by virtue of an act of congress entitled "An act to authorize the Kansas & Arkansas Valley R. Co. to construct and operate a railway

Case stated.

through the Indian Territory, and for other purposes," approved June 1, 1886, were invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Indian Territory, beginning at a point on the eastern line of said territory, at or near the city of Ft. Smith, in the state of Arkansas; thence running, by the most feasible and practicable route, in a northwesterly direction, through the Indian Territory, between the Arkansas river and Cowley county, and the Caney river, in Chautauqua county, Kan., as said corporation may select; and also another branch line, which is not relevant to the issues involved in this case, "with the right to construct, use, and maintain such tracks, turnouts, and sidings as said company may deem it their interest to construct along and upon the right of way and depot grounds herein provided for." That by the second section of said act said corporation was "authorized to take and use for all purposes of a railway, and for no other purpose," a right of way 100 feet in width through said Indian Territory, for said main line and branch of said corporation, and "To take, and use a strip of land 200 feet in width, with the length of three thousand feet, in addition to the right of way, for stations, for every ten miles of road, with the right to use such additional grounds, where there are heavy cuts or fills, as may be necessary for the construction and maintenance of the roadbed, not exceeding 100 feet in width on each side of said right of way, or as much thereof as may be included in such cut or fill: provided, that no more than said addition of land shall be taken for any one station: provided, further, that no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purpose only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall have been taken."

That the third section of said act provided a method for the condemnation of said right of way, and provided that full compensation should be paid the occupants of the right of way by the railway company before its road should be constructed for "all property to be taken or damage done by reason of the construction of such railway." That by virtue of the said act of congress the said defendant proceeded to locate and construct its roads. That defendant now has a large portion of said road in operation. That the road is constructed down to a point on the Arkansas river opposite

to Ft. Smith, in the state of Arkansas, where said defendant now has in progress of construction, and almost completed, a railway, passenger, and wagon bridge across the Arkansas river. The bill further alleges that for several years last past the plaintiffs have been the owners and individual occupants, and as such have held, and now hold and occupy, the land in the Cherokee Nation opposite the city of Ft. Smith for several hundred yards both above and below the point where said bridge is located, and extending back several hundred yards from the bank of said river in said Cherokee Nation, and on both sides of said railway. That heretofore the said defendant, under the provisions of the said act of congress, condemned a right of way 100 feet wide through said lands of plaintiffs, as described in said bill of plaintiffs; for a railway bridge, and for railway, telegraph, and telephone purposes, and for no other purpose. That defendant has been in the quiet, undisturbed, and peaceful possession of said right of way ever since. That, long after said lands were condemned for the purposes aforesaid, the defendant conceived the idea in constructing the bridge hereinbefore described of converting it to or making it a passenger and wagon bridge. That the defendant secured the passage of another act of congress entitled "An act to authorize the construction of a bridge over the Arkansas river, in the Indian Territory," approved March 15, 1890. That said act of congress provided, among other things "That the Kansas & Arkansas Railway Co., a corporation organized and existing under the laws of the state of Arkansas, and being empowered by act of congress approved June 1, 1886, to construct its railway from a point on the eastern boundary line of the Indian Territory at or near Ft. Smith, Arkansas, through said territory, in a northwest direction, to a point on the northern boundary line of said territory, with the power to build a branch as therein provided, the construction and operation of which said line of railway involves the construction of a bridge across the Arkansas river, in the Indian Territory, from a point at or near Ft. Smith, be, and the said Kansas & Arkansas Valley Railway, its successors and assigns, are hereby authorized and empowered to construct said bridge across said river, and to maintain and operate the same as a railway, passenger, and wagon bridge."

The act further provides that the rates of toll which shall be charged for vehicles and foot passengers over said bridge shall be the same as those now established for like service by the laws of Arkansas. The bill further alleges that under and by virtue of the last-named act said bridge has been constructed as a railway, passenger, and wagon bridge. That

said act, authorizing the construction of a passenger and wagon bridge, gave no authority to defendant to take, use, and condemn property for approaches to said bridge, nor under it can the defendant use the right of way obtained under the act of June 1, 1886, for approaches of the roadway for wagons and passengers to its said bridge. The plaintiffs further state that they not only hold the land hereinbefore described as individual occupants, according to the laws, customs, and usages of the Cherokee Nation, but that the ferry privilege across the Arkansas river at Ft. Smith, Ark., attaches to said land, and that they have the license and exclusive right from the Cherokee Nation to run a ferry across that river from the Cherokee side at that point, and are now, and have been for years, interested in running a ferry at that point for the crossing of passengers, wagons, stock, and general travel for hire. That they have a large amount of money invested in said ferry. That defendant is now grading and constructing on its said right of way, condemned, as aforesaid, approaches for a wagon-way and footway to its said bridge for the accommodation of wagons, passengers, and general travel, and has begun to construct approaches on plaintiff's land on both sides of said road, not on its right of way. That said approaches on said right of way are now rapidly approaching completion, and will be completed and used for the purposes aforesaid unless defendant is restrained by this court. The plaintiffs further state that the construction of said roadway on said bridge for passengers and footmen, and other general travel on the right of way of defendant, constitutes an additional burden on the lands of plaintiffs. That the same is unauthorized by the charter of defendant, and the same is in violation of law. That the opening of said bridge and the construction of the passenger and wagon way over the right of way of defendant, or over plaintiff's lands, adjacent thereto, will utterly destroy the value of the ferry privilege attached to said land. The plaintiff's pray that defendant be perpetually restrained and enjoined from further constructing or grading of approaches or roadways to its passenger or wagon bridge for the use or convenience of wagons, passengers, cattle, or other stock either upon or along their said right of way, or upon or over the lands held and owned by plaintiffs adjacent to said right of way. That defendant be restrained from using, and that it do not suffer or permit said grading along, its right of way, where the same runs through the lands of plaintiffs, except for the purposes for which the same was condemned. The plaintiffs pray a temporary restraining order.

The court, upon the showing made in the bill, issued such

temporary restraining order, and also a subpoena giving notice to defendant to appear on the next rule-day of this court, and plead to or answer the bill of plaintiffs. The defendant, by its counsel, filed a demurrer to the bill, and for cause thereof said: "(1) That said bill fails to set up facts sufficient to constitute a good cause of action against this defendant. (2) That said bill fails to set up facts sufficient to constitute a cause of action for equitable relief against this defendant. (3) There is no equity in said bill. (4) That plaintiffs have full, complete, and adequate remedy at law by reason of any damages or injury suffered as alleged in said bill."

At the same time defendant filed its motion to dissolve the temporary injunction heretofore granted in the case, for the reason "(1) That said writ of injunction was issued without any notice of any kind whatever made or had upon this defendant. (2) The granting of the same without notice was in violation of § 3738, of Mansfield's Digest, which, by act of congress approved May 2, 1890, was extended over and made the law of the courts having jurisdiction in the Indian Territory. (3) The granting of said injunction without notice was in violation of equity rule 55, governing United States courts in all equity proceedings. (4) Because the acts of the defendant in the premises in no manner worked an irreparable injury or wrong against plaintiffs. (5) Because defendant did not begin nor attempt to build approaches to its bridge for foot passengers and wagon-way either on the land of plaintiffs or off of its right of way upon lands belonging to any one else. (6) Because the plaintiffs have a full, complete, and adequate remedy at law, if the defendant, as alleged, is guilty of any trespass upon their rights, land, or other property. (7) Because said bill fails to set up facts sufficient, or any facts at all, which entitle the complainant to the interposition of a court of equity. (8) Because there is no equity in said bill entitling complainants to a writ of injunction or other equitable relief, as prayed for in said bill."

By agreement the demurrer and motion to dissolve were heard by the court at the same time.

The first question to be considered is whether the temporary injunction should be dissolved because there was no notice given to the defendant of an application for the same before the same was granted. It is manifest that the court, in determining the question of granting a temporary injunction in this case, is not governed by the statute law of the state of Arkansas that may have been, by an act of congress, extended over

Causes for de-
murrer.

Motion to
dissolve in-
junction.

Temporary
injunction—
Notice to ad-
verse party.

the Indian country ; but it is governed solely by the laws of congress, or the rules of the supreme court regulating equity practice, and the general rules of procedure in equity cases applicable to the equity practice in the courts of the United States. It may be remarked that this court does not have jurisdiction of this case because of the extension of the laws of Arkansas over the Indian Territory by the act of congress of May 2, 1890, but it has jurisdiction because there is involved in it a federal question. The rights of the parties litigant necessitate the construction of an act of congress. The rights of the parties arise under a law of the United States, and involve the construction thereof. Under the clause of the act of congress of 1793, which provided: "Nor shall a writ of injunction be granted in any case without reasonable previous notice to the adverse party or his attorney of the time and place of moving the same,"—a temporary injunction or restraining order could not be granted without notice to the adverse party. But the part of the act of 1793 as above set out has been repealed by § 7 of the act of June 1, 1872. This section is now § 718 of the Revised Statutes of the United States, which is as follows :

"Whenever notice is given for a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

As the rule of equity practice is now established by the above section of the law, if a bill is filed for an injunction, and a subpoena is issued notifying the defendant to appear on a rule-day ; and if, in the meantime, there is a danger that an irreparable injury may be committed, the court, in the exercise of a sound discretion, will issue a temporary restraining order without notice. *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.*, 34 Fed. Rep. 481 ; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 25 Fed. Rep. 1. By the allegations in this bill the injury complained of would have been fully sustained before a hearing could be had in the case, and therefore, if the party is entitled to an injunction to prevent the injury, without power in the court to temporarily restrain, it would be useless to him when he obtained the same. The point that no notice was given of the temporary restraining order is not, in my judgment, well taken in this case.

The defendant, in its motion to dissolve the injunction, for further cause thereof, states that its act in no manner worked an irreparable injury or wrong against plaintiffs, and that

they have a full, complete, and adequate remedy at law, if defendant is guilty of any trespasses upon the rights of plaintiffs, their lands or other property. These allegations go to affect the equity jurisdiction of the court, to which the right to issue an injunction belongs. By § 723 of the Revised Statutes of the United States, "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." This section of the statute "is merely declaratory, and made no change in the pre-existing law." *Lewis v. Cocks*, 23 Wall. (U. S.) 466. It served merely to emphasize the rule already existing. *New York Guaranty & I. Co. v. Memphis Water Co.*, 107 U. S. 214. If merely declaratory of the rule then existing, if we can find, from interpretations of the rules fixing equity and law jurisdiction by the courts of the country, when equity will take jurisdiction, we will have a rule for our guidance which we can safely follow. In *Lewis v. Cocks*, 23 Wall. (U. S.) 470, the supreme court of the United States said: "To bar equitable relief the legal remedy must be equally effectual with the equitable remedy as to all the rights of the complainant. Where the remedy at law is not as practicable and efficient to the ends of justice and its prompt administration, the aid of equity may be invoked." The same court, in *Kilbourn v. Sunderland*, 130 U. S. 514, says: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.

It seems to need but a moment's reflection to satisfy the mind that equity, in a case of this kind, is more efficient to secure the ends of justice, and its prompt administration, than law; that greater justice can be more promptly secured by an appeal to equity, that the wrong may be stopped in its inception, rather than compel the injured party, or the party about to be injured, to wait until all the wrong is done, and then drive him to his action at law to get damages in reparation of wrong of a repeated and continuing character, when the amount of damages is estimable only by conjecture, and not by any accurate standard. Mr. Pomeroy, in his *Equity Jurisprudence*, (§ 1357, vol. 3), says: "Judges have been brought to see, and to acknowledge, contrary to the opinion of Chancellor KENT, that the common law theory of not interfering with persons until they shall have actually committed a wrong is fundamentally erroneous; and that a remedy which prevents a threatened wrong is, in its essential nature, better than a remedy which permits a wrong to be done, and

Equity Jurisdiction—
What is irreparable injury.

then attempts to pay for it by the pecuniary damages which a jury may assess."

In *Com. v. Pittsburgh & C. R. Co.*, 24 Pa. St. 159, the supreme court of that state, in a most able opinion, declares that the courts will interfere by injunction to prevent wrongs of a repeated and continued character, but which occasion damages which are estimable only by conjecture, and not by any accurate standard, and that this is what is meant by irreparable damages, or mischief, in injunction cases. If this be so, then, when a state of case of that description exists, the damage is regarded as irreparable; and, if irreparable, it must be of a kind for which a party does not have a plain, adequate, and complete remedy at law, for, if he has such remedy at law, the damage is not irreparable. If the remedy at law is not as plain, adequate, and complete as one obtainable in equity in case of a continued trespass, the party may prevent the injury by injunction, rather than wait until it is done, and then look for his damages in a court of law. High, *Inj.* § 702, says: "It is frequently a matter of difficulty to determine what constitutes such a degree of irreparable injury as to warrant a court of equity in enjoining what might otherwise seem to be an ordinary act of trespass, for which an adequate remedy at law might be found. * * * When the trespass complained of is repeated or continued, in the nature of a nuisance, or when the wrongful acts continued, or threatened to be continued, may become the foundation of adverse rights, and occasion a multiplicity of suits to recover damages, the case presents such equitable features as to entitle complainant to the aid of an injunction. So, too, a trespass which is continued, and will ripen into an easement, may properly be enjoined." Mr. Foster, in his *Federal Practice*, (§ 215), says that "Injunctions to restrain trespasses are only granted when the trespass is destructive or continued. * *

* An attempt by a railroad company to build its road upon private property without compensation may be thus prevented." Again, at § 210, he says it may be granted "to suppress the continuance of a public or a private nuisance; to prevent a threatened destructive trespass." A private nuisance is anything done to the hurt of the land or tenements or hereditaments of another, anything that unlawfully worketh hurt or inconvenience or damage. 3 Bl. Comm. 215, 216; 2 Bouv. Dict. 245. Whatever annoys or does damage to another is a private nuisance. And. Law Dict. 717. Thus we see a private nuisance, as thus defined, may be prevented or suppressed by an injunction. "In a case where private property has been taken by a railroad company without compensation by such company, the remedy in equity in the shape

of an injunction protects both the owner and those acting under the authority, and is more speedy and efficacious in its operation than the ordinary legal remedy." Section 632, Lewis, Em. Dom. In *Browning v. Camden & W. R. Co.*, 4 N. J. Eq. 46, the chancellor held: "If a R. R. Co. claim a right to enter upon land under color of law without having complied with the requirements of that law, a court of equity will restrain that entry by injunction." In the case of *Bonaparte v. Camden & A. R. Co.*, 1 Baldw. (U. S.), 229, the court, in treating of the remedy says: "If his rights of property are about to be destroyed without the authority of law, or if lawless danger impends over them by persons acting under color of law, when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass, a court of equity will enjoin its commission."

In *Western Md. R. Co. v. Owings*, 15 Md. 199, the court held "that a R. R. Company may be enjoined from constructing its road without authority over private property, for the use of which it has not paid or tendered compensation, whether or not the injury is irreparable." In *Bird v. W. & M. R. Co.*, 8 Rich. Eq. (S. Car.), 46, the court held that "An injunction will be granted where the act complained of is attended with permanent results, destroying or materially altering the estate, or where defendants are attempting to make permanent appropriation of land admitted or proved to belong to plaintiff, and the license or warrant of the defendant to encroach upon it is deemed doubtful by the court. That a R. R. Company will be enjoined from appropriating land admitted or proved to belong to a plaintiff, when not authorized to do so by its charter."

These principles affecting equity jurisdiction are generally sustained by the English equity courts. This is the source of our chancery jurisdiction. The American chancery courts are generally as clear and explicit as are the English chancery courts in sustaining chancery jurisdiction in cases such as I have referred to. This is the rule as to jurisdiction that is simply declared by § 723 of the Revised Statutes of the United States. The doctrine of the above cases is fully sustained by the case of *Griffing v. Gibb*, 2 Black (U. S.), 519. This was a case where an injunction was prayed to prevent injury to a city lot in San Francisco. The case of *Eidemiller v. Wyandotte City*, 2 Dill. (U. S.), 376, is a case where an injunction was prayed to prevent the making of an embankment on a road that had been laid off through the land of plaintiff; but the same had not been condemned and paid

for. It was objected by the defendant that the complainants are not entitled to an injunction, because the injury complained of was not irreparable, and because they have a full and adequate remedy at law. In reply to this Judge DILLON said: "I deem it unnecessary to follow the counsel in their discussion. The making of a high embankment of great width and length, to be used as a public roadway, falls, I think, within the legal notion of an irreparable injury, and gives a clear and recognized right to an injunction."

The same principle is recognized in *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 1 McCrary (U. S.), 302, 3 Fed. Rep. 702, 1 Am. & Eng. R. Cas. 12.

There can, I think, be no doubt of the right of plaintiffs to an injunction, provided they have any equity growing out of any injury to a right they may possess. The defendant asserts that "there is no equity in said bill entitling complainants to a writ of injunction, or other equitable relief prayed for in the bill." This depends on the right or interest plaintiffs may have remaining in the property, which has, by right of eminent domain, been taken in accordance with law, and paid for, to be used for a specific purpose, and no other; for using for any other purpose was expressly prohibited by act of congress of June 1, 1886. Section 2 declares "that said corporation is authorized to take and use for all purposes of a railway, and for no other purpose, a right of way," etc. The same section further provides that the lands herein authorized to be taken "shall not be used except in such manner and for such purpose only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines." If any other use than for railroad purposes would cast an additional burden on the land of plaintiffs, the same could not be used for any other purpose than that for which it was condemned, unless express authority, or authority by necessary implication, was given, authorizing condemnation for such additional use. We do not find in this case any such authority given as would authorize the use of the right of way for any other than railroad purposes, but, on the contrary, we find such use expressly prohibited by the act of congress of June 1, 1886. It was under this act of congress that the right of way was condemned, upon the application of defendant, and the same was paid for as condemned by it. This power, granted by this act of congress, must be exercised for the purpose for which the power was granted, and for no other purpose; for lands acquired by corporations for a specified purpose cannot be used for others. *Green's Brice, Ultra Vires*, pp. 104, 109-

Plaintiffs
interest in
property—
Use for other
purposes
than right of
way.

112; *Imlay v. Union Branch R. Co.*, 26 Conn. 250; *American Telep. & Teleg. Co. v. Smith*, 71 Md. 535. The land taken by defendant in this case, under the act of congress of June 1, 1886, was taken *in invitum*, and defendant only acquired an easement to it, and such easement as the act of congress authorized. But does the use of the railroad right of way

Use of land
for bridge
subjects it to
new use.

by defendant for the purpose of building a wagon and passenger bridge subject the land of plaintiffs to a new use which injuriously affects the same? If it is a new use which does not injuriously affect the value of their land, then their estate in such land is not injuriously affected by the supervening servitude, and there is not a taking of their property. In every case where there is a taking of private property for public use it must be with just compensation. Article 5, Amendment to the Constitution of the United States. What is meant by the taking of private property, or, rather, what is meant by an additional taking? There has been one taking by the defendant. Was the use of its railroad right of way for the approaches of a wagon and passenger bridge an additional taking? Mr. Elliott, in his work on Roads and Streets, 155, says if there is a "Subjection of the land to an easement, or any other burden incompatible with the dominion of the owner, or the serious interference with the use of the enjoyment of the property, it will be deemed a taking, within the meaning of the organic law. An incident annexed to land may be of value, and to wrest such a thing from the owner for a public use is to take from him his property. The term 'property' is by no means limited to land itself, but embraces all the incidents which give value to the owner, and includes the right which pertains to the ownership of things real and personal; and, whenever there is a direct and substantial invasion of these rights, there is a taking, in the constitutional sense, conferring upon the owner a right to compensation."

The supreme court of the United States in *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.), 166, says: "That it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution." And, as a matter of course, one that gives the owner a right to additional compensation, because his land, if the additional burden is cast upon it, is again taken for public use, and he is entitled to additional compensation, although the land may have been taken and paid for, if paid for a use other than the one for which it is taken the second time, as whatever use was contemplated in

the original condemnation, and the damages resulting therefrom are the damages and use included in the assessment therefor. But a use beyond the purpose of that condemnation, and which could not, for the want of legal power, be included in it, would be a new use, and would create a new servitude, if it cast any additional burden on the lands of plaintiffs, or on the right of way already condemned for a specific purpose. The question then presents itself, does this use of the right of way of defendant, already condemned for railroad purposes, for the approaches to the wagon and footway part of its bridge, under the above rule laid down, cast any additional burden on the adjacent land of plaintiffs? If such use affects the value of such property to an extent to which it was not affected by the original taking, then it is subjected to a new use, which creates an additional burden upon its owner, and which subjects the land to a new servitude, and consequently there is a taking of private property for public use, which has not been paid for.

The proof submitted in this case shows that plaintiffs are the owners by right of perpetual occupancy of the lands on either side of the approaches to the wagon and footway part of the bridge for several hundred yards back of the river on the Cherokee side of it; that the same is the river front at the above named point; that there is now, and has been for many years, a ferry owned in part by plaintiffs, used by them in crossing wagons, foot passengers, and live stock of all kinds for hire over the Arkansas river; that said ferry now lands, and has for many years landed, on the Cherokee side of the river on the lands owned by plaintiffs; that the same have a peculiar value because of their being particularly adapted to use as the site of a ferry landing. The plaintiffs show the existence of the ferry, and its landing on their lands, to prove the eligibility of the same as a ferry landing. Can this fact be taken into consideration in assessing the value of these lands? And are they rendered less valuable for use as a ferry landing by the building of the bridge as a wagon and footway bridge? When private property is taken for public use, the owner is entitled to full compensation, which means the fair market value of the property at the time of the taking. In *Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 408, the supreme court of the United States says: "The inquiry in such cases must be, what is the property worth in the market, viewed, not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted? That is to say, what is it worth from its availability for valuable uses? Property is not to be deemed

Damages—
Peculiar
value of land
for ferry
purposes.

worthless because the owner allows it to go to waste, or to be regarded valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and various are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the future."

In the case of *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381, 33 Am. & Eng. R. Cas. 169, the supreme court of Arkansas fully recognized the above rule, and held that, in estimating the value of the land of Woodruff, the fact that such land had on it a site well suited for the landing of the end of a bridge, might be taken into consideration in fixing the value of the same. The court further said: "In a proceeding to condemn a site for a railroad bridge, evidence to show that the land required for that purpose possessed peculiar advantages as a bridge site is admissible as affecting the question of its value." In the case of *Little Rock & Ft. S. R. Co. v. McGehee*, 41 Ark. 202, 20 Am. & Eng. R. Cas. 82, the land appropriated by the railroad company was worthless for habitation or cultivation, but its prospective value for a ferry landing, to be established in the future, was allowed in the estimate of damages. Under the above rule the adaptability of the lands of plaintiff for ferry landing purposes is a circumstance that they have a right to insist upon as an element that goes to make up the market value of their lands. If the defendant, by the construction of its wagon and footway bridge, necessarily injures the value of plaintiffs' lands, such value growing out of its adaptability as a ferry landing, does it not take away this element of value? If so, there is a burden cast upon the land by the defendant,—a servitude of such a character as to injure, if not largely destroy, its value. If the act of defendant in building its railroad bridge did not affect this peculiar value of the lands of plaintiffs, and its building its footway and wagon bridge does affect such value, or if its building its railroad did not as largely affect the value of such lands as does the building of its wagon and foot bridge, then, by such last named act, there is most certainly a new servitude cast on the land, which affects its value. The peculiar

value of this land grows out of the fact that it is eligible as the site of a ferry landing. One of the elements that largely makes it so eligible for such purpose is that at that point on the river there is a ferry, with a large patronage from the people. Take away that patronage, and it is scarcely any more eligible or valuable as the site of a ferry landing than any other point on the river. The building of the wagon and footway bridge will very largely destroy the patronage of the ferry, and in this way affect the value of the ferry landing. The building of the bridge as a railroad bridge only could not to this extent affect the value of the land, because the amount of patronage the railroad would take from the ferry would amount to scarcely nothing, and, in condemning the land for railway purposes alone, there would be no injury of this kind* to take into consideration. I think we can therefore see that it is clearly a new use,—a new servitude cast upon the land by the building of the wagon and foot bridge. A property which has been condemned for public use under the right of eminent domain cannot be subjected, under such condemnation, to an additional charge, without another condemnation; for, when the public use has ceased, the property will then revert to the former owner. *Mills*, Em. Dom. § 57. Some evidence has been offered to show that the value of this land as a ferry landing site was taken into consideration when the right of way for railroad purposes was condemned. It could not be, as the building of the railroad or the railroad bridge could not materially affect the value of this land by the taking of patronage from the ferry, which has its landing on these lands, and thereby they are made more valuable. Then the injury to them by the building of a wagon and footway bridge could not have been considered in the first condemnation, because defendant at that time had no authority to build such a bridge. Under the act of congress of June 1, 1886, the land could be condemned but for one purpose, and that was the purpose of a railway; for this was taking private property for public use by the right of eminent domain, the exercise of a reserved sovereign power, and such power can only be exercised when the power is granted, and in the manner granted. *Lewis*, Em. Dom. § 237. The condemnation of private property for public use must be to subserve the use authorized.

We are not to consider any direct injury to the ferry franchise, but we may consider the existence of this franchise, and the fact that it is being used, and that a ferry is being run, which does a large business, and which on one side of the river has its landing on the land of plaintiffs, adjacent to the approach to the bridge, and for these reasons the land is made

more valuable. This is an evidentiary fact, to show the eligibility of this land for a particular purpose.

It is claimed that this additional burden can only be considered as affecting the interest of the holder of the fee of this land, the Cherokee Nation. As between the holder of the fee and an ordinary tenant this is true, but these plaintiffs, under the laws of the Cherokee Nation, hold this land in such a way as to give them the right of perpetual occupancy. The reason why additional damages, growing out of a new burden cast upon the property, goes to the owner of the fee is because the ordinary tenant is not likely to have an interest so durable as that it can be affected by this new charge cast upon the property. But if the party has such a perpetual interest in the property that it is manifest that the additional burden cast on it does injury to it, the reason of the rule ceases, and in justice a new principle should operate. While citizens of the Cherokee Nation do not have a fee to the lands they occupy, they can hold them forever, and fully enjoy the profits arising from them, and this right may be granted to their heirs, or may descend by inheritance. Practically they get all the productions of the land, the same as though they held it in fee. If there is any peculiar value to the land, it attaches to the right of possession, and the occupant gets the benefit of it. The plaintiffs have such a right to their lands as that they could resume possession of them whenever the original use for the purpose for which they were condemned shall be finally abandoned; and, while they do not hold the fee to the land, I think their interest is so great as to entitle them, as perpetual occupants, to compensation for the additional servitude cast upon their lands, for this additional servitude affects them more intimately and more effectively than it does the Cherokee Nation. The circuit court of the United States, in *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 1 McCrary (U. S.), 302, 3 Fed. Rep. 702, declares: "The open and acknowledged possession of a party is sufficient to maintain injunction to prevent such possession being disturbed by being taken for a R. R. right of way." I think this principle is justly applicable to the existing condition in this case.

The remaining question which was presented in argument is, has congress conferred upon defendant the power to condemn the property of plaintiffs for approaches for a wagon and footway bridge? As already declared, there is an additional taking of the property of plaintiffs, because there is, in addition to the easement already enjoyed by defendant, the subjection of the property to an additional servitude,

**Cherokee
Nation—Title
to lands.**

**Defendant's
authority to
take land for
bridge
purposes.**

which amounts to another taking; and, before there can be that taking by the defendant, there must be authority for it. The right of eminent domain in government is the right to take private property by an extraordinary method; extraordinary, because it does not involve the consent of the owner. Because it may thus be asserted against the individual citizen, the party asserting it must assert it by the authority of the law-making power, when given in express terms or by necessary implication. Lewis, *Em. Dom.* § 240, says: "The exercise of the power being against common right, it cannot be implied or inferred, but must be given in express terms or by necessary implication." When the act of congress authorizing the building of the wagon and footway bridge fails to make any provision for compensation, it is to be presumed that congress did not intend that the power of eminent domain should be exercised, but it contemplated that the right might be obtained by negotiation, by contract with the owners. This principle is fully sustained in *Pennsylvania R. Co's Appeal*, 93 Pa. St. 150, 3 Am. & Eng. R. Cas. 507. Judge Dillon, in his able work on *Municipal Corporations*, (§ 469,) says: "Not only must the authority to municipal corporations or other delegated legislative agents to take private property be expressly conferred, and the use for which it is taken specified, but the power, with all constitutional and statutory limitations and directions for its exercise, must be strictly construed. Since the power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity, or an urgent public policy, the rule requiring the power to be strictly construed, and the prescribed mode for its exercise strictly followed, is a just one, and should, within all reasonable limits, be inflexibly adhered to and applied." The right of eminent domain is one which lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise. *Dyckman v. City of New York*, 5 N. Y. 434; *Cooley*, *Const. Lim.* 527; *Allen v. Jones*, 47 Ind. 438.

The court in *Water Works Co. of Indianapolis v. Burkhart*, 41 Ind. 364, said: "No property can be taken for public use by condemnation or otherwise than by legislative authority, and in the manner and for the purposes authorized." These declarations of a legal principle are fully sustained by all the authorities on the subject.

It is claimed for the defendant that the act of congress of June 1, 1886, granting a right of way to the defendant for railroad, telegraph, and telephone purposes, and the act of congress of March 15, 1890, authorizing the construction of

defendant's bridge across the Arkansas river, at Ft. Smith, as a wagon and footway bridge, are to be construed as laws *pari materia*. I think this is correct. But by such construction we cannot evolve from these acts of congress the power to condemn the property of plaintiffs, unless such power, expressly or by necessary implication, exists in one or the other of these acts, and unless the purpose of the exercise of such power is to be found, expressly or by necessary implication, in one or the other of them. Does it so exist? As we have already seen, by the act of June 1, 1886, the defendant was authorized to take property and use the same for all purposes of a railway, and for no other purpose,—a right of way, etc.: and the section further provides that the lands taken “shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines.” Use of the lands for approaches of a wagon and footway bridge is not use for railroad, telegraph, or telephone purposes. The use for railway purposes alone is the use to which the land authorized to be condemned was limited by the act of congress. Then there is no express authority to condemn for the use of a footway and wagon bridge in this act of congress, nor does it appear by necessary implication. But, on the contrary, a use of that kind, as well as all other uses, except for railway, telegraph, and telephone purposes, is expressly prohibited. In the act of March 15, 1890, authorizing the building of a footway and wagon part of the bridge, there is not a word on the subject of the condemnation of private property to be used in the construction of the bridge. There is therefore in this act no express authority to condemn, nor can it arise by necessary implication. If there is no authority in either act to do this thing, we cannot create an authority by construing the two acts as laws *pari materia*. If the authority does not exist in either of the acts, we cannot find its existence by putting them together. After a careful examination of these laws of congress, and all the authorities upon the condemnation of private property for public use, I have arrived at the conclusion that defendant has now no power to condemn the land of plaintiffs for use as an approach for a wagon and footway bridge; and to get the right, and use the same for such purpose, defendant must either go to congress for authority to exercise the right of eminent domain, or negotiate with plaintiffs for the use of the right of way as an approach to its wagon and footway bridge. It is in my judgment a matter of great regret that authority to condemn has not been given, as it works delay in the completion of a great thoroughfare, which will be an important agency in securing

the development, progress, and prosperity of the country, and consequently of great and lasting benefit to the people. Yet when plaintiffs have a legal right, although it may be but a small one, when weighed in the balance against the general good to be subserved by the early completion of the bridge, still it is a right, no matter how small it may be, that must receive the full measure of protection afforded by the law, and it is a right of which plaintiffs can be divested alone in the manner provided by the law. I am sure no one, after a full investigation of this whole question, will ask that plaintiffs' rights be taken from them without authority of law. The motion to dissolve the injunction, and the demurrer to the bill, will be overruled.

Eminent Domain—Consideration of Special Value of Land for Particular Purposes in Estimating Damages.—See *Currie v. Waverly & N. Y. B. R. Co.* (N. Y.), 44 Am. & Eng. R. Cas. 100; *Pennsylvania S. V. Co. v. Cleary* (Pa.), 39 *Id.* 132, note 138, 144; note 36 *Id.* 606.

Jurisdiction of Federal Court in Condemnation Proceedings—Enjoining Entry Pending Suit in State Court.—Under Rev. St. U. S., § 720, which forbids federal courts from staying proceedings in state courts except in bankruptcy matters, a federal court will not, pending a condemnation suit in a state court, enjoin the petitioner from entering upon the land sought to be condemned. *Dillon v. Kansas City, S. B. R. Co.* (C. C.) 43 Fed. Rep. 109.

Contract Between Railroad Company and Landowner for Right of Way—Institution of Condemnation Proceedings by Landowner—Temporary Injunction.—Where an owner of land entered into a written contract with a railway company to grant, and finally to convey, to the railway company a right of way across the owner's land, upon the condition that the railway company should construct and maintain upon the land a passenger depot, with proper side tracks and stockyards sufficient to do the business there offered, and permitted the railway company to take the immediate possession of such right of way under such contract, and to construct thereon its railway, and the railway company did construct thereon its railway and a side track and a passenger depot and stockyards, but the owner of the land and the railway company honestly differed in opinion as to whether the company had fulfilled all the conditions of the contract, and the owner of the land then instituted condemnation proceedings, under the statutes, for damages, and the railway company then commenced an action to perpetually enjoin the owner from prosecuting his condemnation proceedings, and the court granted a temporary injunction to restrain such owner from so prosecuting his said proceedings until the injunction case should be finally heard and determined upon its merits, *held* not error. *Harvey v. Kansas, N. & D. R. Co.*, (Kansas, Jan. 10, 1891), 25 Pac. Rep. 578.

Injunction to Restrain Occupation of Land Pending Proceedings by Certiorari to Review Condemnation.—The supreme court has no power to restrain a railroad company from occupying and using land sought to be condemned for a right of way, pending proceedings by *certiorari* to review the condemnation proceedings. *Traverse City, K. & G. R. Co. v. Seymour*, 81 Mich. 378.

Action for Wrongful Entry on Land—Declaration Sounding in Trespass.—How. Mich. Stat. § 7759, under which an action on the case lies where, by the wrongful act of any person, an injury is produced, either to the person, personal property, or rights of another for which an action of trespass may by law be brought, has no reference to trespass upon lands, the

words, "or rights of another," referring to injury to a large class of *personal* right not enumerated, but included, in the section. *Wood v. Michigan Air Line R. Co.*, 81 Mich. 358.

Action to Recover Possession of Land Taken Without Compensation.—In Minnesota, it is held that under § 33, chap. 34, Gen. St. 1878, which provides an action in the nature of ejectment where compensation for taking land has not been made, a landowner may maintain an action to recover land taken for a railroad without compensation being paid, and the company not having, by contract or otherwise, a right to the possession. *Shoemaker v. Cedar Rapids, I. F. & N. W. R. Co.*, 45 Minn. 466.

Acquiescence by Landowner in Unlawful Entry.—If a railroad company makes an unlawful entry upon the land of another person, for the purpose of constructing thereon a roadbed for its track, it is the duty of such person, at once and peremptorily, to forbid such unlawful entry, and to undertake the necessary legal means to prevent it. If, on the contrary, he fails to invoke the arm of the law at a time when it would have been of avail to him, and acquiesce in such entry, and permit the corporation to construct its road thereon, without resorting to expropriation proceedings, he cannot afterwards require its demolition, or prevent its use. *Mitchell v. New Orleans & N. E. R. Co.*, 41 La. Ann. 363.

Action of Trespass Against Railroad Company for Entering on Land Without Having it Set Apart or Notifying the Owner of an Intention to Take It.—In *Bellingham Bay R. & Nav. Co. v. Loose*, (Wash. July 1, 1891), 27 Pac. Rep. 174, it was held that a railroad company cannot enter upon land and destroy trees and shrubbery, without any setting apart of the land to be taken or notice to the owner of an intention to take it, and an action of trespass will lie where such has been done, although Code Wash. § 2455, as amended by Act Feb. 1, 1888, provides that "a corporation organized for the construction of any railway * * * shall have a right to enter upon any land * * * between the termini thereof, for the purpose of examining, locating, and surveying the line of such road, * * * doing no unnecessary damage thereby." And § 2456, as amended, provides that "such corporation may appropriate so much of said land * * * or premises as to enable such corporation to construct and repair its road, * * * compensation therefor to be made to the owner." The court said: "It is somewhat difficult to understand just what the legislature meant by providing all the details for condemning property, and the method of fixing compensation therefor, and making it applicable to both owner and railroad company. The whole scope of the act is that of one designed only for the use of the corporation desiring to acquire land, and is largely inapplicable to the case of an owner desiring simply to obtain compensation therefor, and the only reasonable interpretation that can be given would seem to be that the owner could only make use of this means of obtaining compensation when the property had already been taken possession of and fully occupied by the railroad, either with his actual consent, or under such circumstances that his consent would be presumed. It is not necessary, however, for the purposes of this case, to decide just what the respective rights of the appropriator and owner of lands are under said act. It is sufficient for my purpose to decide that where, as in this case, the entry is made without any notice to the owner of an intention to take under the act in question, and without any setting apart of the land to be so taken, said act will not so apply as to defeat an action of trespass by the owner, and I think such must be the construction of said act. I am satisfied that it could not have been intended thereby to clothe a railroad or other corporation with the right to go upon the premises of any person, and destroy his trees and other property, without in any manner giving him notice that in doing such acts they were pro-

ceeding under the law, for the appropriation of property for public use. Such would not be a reasonable provision of law. Under it an owner of property would be powerless against the arbitrary and oppressive methods of a corporation. Before there would be given any opportunity on the part of such owner to contest the question as to whether or not such lands were necessary for the purposes of the corporation, all the acts of damage would have been accomplished. And if, afterwards, the owner should seek compensation under the act in question, how could he protect himself and intelligently maintain his contention that such taking was not necessary? Besides, the provision of our constitution, providing that no property shall be taken for public use without compensation being first paid therefor, might be entirely nullified. The corporation, after procuring the condemnation of the property and its possession thereunder, might long delay the payment of the award therefor; and while it is true that the constitution was not in force at the time of the trespass alleged, yet I think that substantially the same rule obtained under the organic act. If I were to construe the statute as contended for by appellants, I should think it clearly unconstitutional, as tending to render inoperative that provision of our constitution (and of the organic act) referred to above. It is true that it might not in terms and directly provide for taking one's property without compensation first paid, but its effect might be to practically accomplish that end. I think the more reasonable interpretation of the statute is to hold that a corporation desiring to appropriate land from another must, before entering thereon (except for the purpose of survey as provided by statute), proceed under said act to show the necessity for such taking, and have the compensation to be paid fixed and actually paid or secured before it would have a right to take possession of and work upon the same. Under it the owner, after a corporation had actually taken possession of his property so that the degree of its occupancy was fully shown, could probably proceed to have his compensation assessed if he saw fit to do so, instead of bringing an action of trespass for his damages; and, if he had given express or tacit consent to such occupancy by the corporation, he would probably be bound to proceed under said act, and could not bring his action of trespass. Thus construed, the statute is reasonable, and not oppressive; but, construed as contended for by appellants, it is most unreasonable and oppressive, and, in my opinion, unconstitutional. It follows that the action of the court below was correct, and must be affirmed."

ST. JOSEPH & IOWA R. Co.

v.

CUDMORE.

(103 Missouri, 634.)

Eminent Domain—Right of Landowner to Jury Trial.—Article 12, § 4, of the Mo. Const. of 1875, provides that "the exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking by the general assembly of the property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise

of said right." Under this provision, *held*, that a landowner in condemnation proceedings is entitled to a jury on the assessment of damages. And this is true irrespective of whether the corporation prosecuting the condemnation was created before or after the adoption of the constitution. The constitutional provision permitting the jury does not interfere with the vested rights of previously created corporations.

APPEAL from Buchanan Circuit Court.

L. S. Brown, for appellant.

Vories & Vories, for respondent.

BARCLAY, J.—This is a proceeding begun in 1885 to condemn a right of way for railroad purposes over land of defendants. The trial court ruled that the latter were

Case stated. entitled to an assessment by a jury of their damages for the land taken. To this plaintiff excepted, claiming that under its charter the damages need not be assessed by jury. Conceding, for the purpose of this hearing, the claim of plaintiff that, by the special acts incorporating it in 1857 and 1866, it was authorized to appropriate the use of land, necessary for its railway, by means of condemnation proceedings in which no jury was demandable for the assessment of damages, the question then arises to the effect upon

Constitutional provision. such legislation of the adoption in 1875 of the present state constitution, containing this provision:

"The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation when, in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right." Section 4, art. 12, Const. 1875. In another part of that instrument, "and to carry the same into complete effect," it is declared that "the provisions of all laws which are inconsistent with this constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this constitution, as require legislation to enforce them, shall remain in

Repeal of special law by constitutional provision. force until the first day of July, one thousand eight hundred and seventy-seven, unless sooner amended or repealed by the general assembly." Schedule, § 1, Const. 1875. From this it is manifest that at least some parts of the fundamental law were intended to operate to change existing statute laws as well as to replace prior constitutional provisions. When such intent

is clear with reference to any particular subject the duty of the courts is to effectuate it, where the change intended involves no violation of vested rights secured by the constitution of the United States or of this state. In each instance where an issue arises as to the repealing effect of a constitutional provision, we must endeavor, as best we may, to arrive at the purpose in view, in that regard, considering the language used, its context, and the effect of the proposed construction with reference to the existing law. *State v. Frazier*, (1889,) 98 Mo. 426. The common rule undoubtedly is that a special law is not to be regarded repealed by a later general law on the same subject, but that rule yields to a clear expression of a different intent in the latter enactment. *State v. Bennett*, (1890,) 102 Mo. 356. In the case before us, the charter of plaintiff permitted it to exercise the right of eminent domain to secure the necessary right of way for its railroad. The method of proceeding pointed out for this purpose, in case of a failure to agree with the owner of any needed land, was (describing it generally) by petition to the circuit judge, indicating the desired location of the railroad, and the appointment of sworn "viewers" to report the damages sustained by such owner upon notice to the latter, and, on a report of the viewers, judgment was to be entered, which became final unless objections were filed, etc. In the proceedings under review the plaintiff began as above indicated, in accordance with its charter, but, after the report of the viewers, defendants objected to the damages awarded them, and demanded a jury to fix the proper amount of their compensation. To this demand the trial court assented, and submitted that issue to a jury. In so doing we think there was no error. We regard § 4, art. 12, of the constitution of 1875, as intended, by its terms and obvious object, to apply to condemnation proceedings by corporations then existing, as well as by those thereafter created, and that it requires no legislation to make it operative and effective. *People v. McRoberts*, (1871,) 62 Ill. 38; *Mitchell v. Illinois & St. L. R. & Coal Co.*, (1873,) 68 Ill. 286. The mode of procedure to be followed in exerting the state's sovereign power of eminent domain is thereby modified only to the extent of providing for a trial by jury of the issue as to proper compensation to the landowner. The plaintiff's right to acquire the necessary land is not impaired. The manner of exercising the right is merely changed in a particular which seems to us plainly within the state's power to regulate. Such change in the procedure does not in any wise infringe any vested charter right of the plaintiff. *Baltimore & S. R. Co. v. Nesbit*,
Landowner
entitled to a
jury.

(1850,) 10 How., (U. S.) 396; Long's Appeal, (1878,) 87 Pa. St. 114; Chesapeake & O. R. Co. v. Patton, (1876,) 9 W. Va. 648; McCrea v. Railroad Co., (1871,) 3 S. Car. 381; Springfield & I. S. R. Co. v. Hall, (1873,) 67 Ill. 99. The point above discussed is the only one on which error is assigned. The judgment of the circuit court is affirmed.

SHERWOOD, C. J., and BLACK, J., concur.

Eminent Domain—Right of Landowner to Jury Trial.—See *post*, Postal Telegraph & C. Co. v. Alabama G. S. R. Co. and note.

POSTAL TELEGRAPH CABLE CO.

v.

ALABAMA GREAT SOUTHERN R. CO.

(Alabama Supreme Court, June 23, 1891.)

Eminent Domain—Right to Jury Trial—Appeal.—The constitutional guaranty of the right in condemnation proceedings to have damages "determined by a jury according to law," demands a jury of twelve men. Accordingly, a statute is unconstitutional which authorizes an appeal from the probate court, where the damages may be ascertained by a jury of six men, directly to the supreme court, within three months, since, in such case, the party would be deprived of his right to a trial by a constitutional jury. And this is true although another statute allows an appeal to the circuit or supreme court from any final decree of the probate court within a year, and if the case is taken to the circuit court a trial by a jury of twelve may be had.

APPEAL from Sumter Probate Court.

McIntosh, Williams & Russell, for appellant.

J. J. Attman, for appellee.

MCCLELLAN, J.—Article 2, chap. 15, (§§ 3207-3220), of the present Code, was intended to provide, and did provide, for a complete proceeding by which lands might be condemned to public uses, from the initiation thereof by application to the probate court of the county in which the land, or a material portion thereof, proposed to be condemned, is situated, to a final determination, if need be, on appeal to this court. Section 3210 provides for the summoning, impaneling, and assessment of damages by a common-law jury of 12 men, in recognition of the right secured to the parties by the organic law to a jury of that number. Section 3215 relates to the hearing and trial invoked by the application, and for a review of the rulings of the presiding judge therein by the supreme court,

Statutory
provisions.

the provision in this latter respect being that "on the trial and hearing either party may, by bill of exceptions, reserve any charge, opinion, or decision of the court, as in cases in which bills of exceptions are allowed in civil cases in courts of common law; and either party is entitled to an appeal to the supreme court from the order of the court within three months from the making thereof." The general assembly, by an act approved February 28, 1889, amended § 3210 so as to provide for a jury of six men only, thus marring the system established by the article referred to, and rendering it impotent by the scope and force of its own provisions, to afford a complete and perfect remedy for the condemnation of lands in that no jury, within the sense of constitutional guaranties, is now secured to the parties by its terms. After this amendment, the case of *Woodward Iron Co. v. Cabaniss*, 87

Ala. 328, presented for consideration the question whether these provisions of the Code, as changed by said act of 1889, were not violative of art. 14, § 7, of the constitution, which entitles either party, on demand, to have the damages "determined by a jury according to law." This court said: "**The constitutional provision—Iron Co. v. Cabaniss.** * * *

We are inclined, also, to the view of appellant's counsel, that § 3210 of the present Code, as amended by the act approved February 28, 1889, contemplates nothing more than a preliminary assessment, and not a final trial by a lawful jury. That section, as amended, authorizes a jury of as few as six jurors. A lawful jury, within the meaning of the constitution, means a jury of twelve men, according to the usages of the common law." The inevitable conclusion from these considerations was that the system for condemnation of land for public uses provided by this article of the Code, and the statute amendatory thereof, was, in and of itself, unconstitutional for the lack of a provision whereby a jury trial might be had. It had been ruled in *Montgomery S. R. Co. v. Sayre*, 72 Ala. 443, 20 Am. & Eng. R. Cas. 203, however, that an infirmity of this kind would be relieved if the law—either the particular enactment providing for *ad quod damnum* proceedings, or any other statute obtaining in the premises—authorized or admitted of a jury trial being reached on appeal from the preliminary assessment of damages in the probate court. Invoking the aid of that principle, it was held in *Woodward Iron Co. v. Cabaniss*, *supra*, that § 3640 of the Code secured to the parties the right of appeal to the circuit court, in which they could have the damages assessed by a jury as guarantied to them by the organic law, and hence that the provisions of article 2, as amended, were not, when considered in connection with § 3640 of the Code, violative of the

constitution. The effect of this decision was to make the section last referred to, for all practical purposes, as much a part of the article in question as if it had been bodily incorporated therein. Not only so, but all other provisions relating to the time, manner, etc., of taking an appeal under § 3640, practically become integral parts of the system for the condemnation of lands, including, of course, § 3619, which prescribes that an appeal, under § 3640, must be taken within one year from the rendition of the judgment or decree. We have then two separate and distinct and wholly different provisions as to appeals from the preliminary assessment of damages in *ad quod damnum* proceedings.¹

Two methods of appeal.

In one, the appeal is on bill of exceptions for the correction of errors of law; in the other, the appeal is on the merits, and for a trial *de novo*. The one is to this court; the other is to the circuit court. The former affords no opportunity for a jury trial, and, if it stood alone, the whole system would be for this reason unconstitutional and void; the latter secures to the parties this constitutional right, and of its own force saves the system from invalidity on this account. In the first, the appeal may be taken at any time within three months from the order of condemnation; by the terms of the last, the appeal may be prosecuted at any time within a year. The present appeal is taken by the movant on the bill of exceptions directly from the probate to this court. The motion made by appellee to dismiss the appeal raises the question whether both the provisions to which we have referred can stand. If either must fall, it must be that one which undertakes to authorize an appeal to this court, since that the other is of force in this class of cases is *stare decisis*, and since the whole system would come under the ban of the constitution, if the right to appeal to the circuit court should be denied. So that the real question is whether the statutory provision which undertakes to give a right to come here on bill of exceptions is not so inconsistent with the constitutional right effectuated by § 3640 as to be nugatory. It is too clear to admit of much discussion that both rights cannot be enjoyed at one and the same time, or even at any time in the same case. Of course one party could not take two appeals,—one to the circuit court and the other to this court. No more could one party come here and the other go to the circuit court. If that were allowable, there would be no end to the anomalies which might arise, not to speak of the striking anomaly in the first instance resulting from two appeals from one judgment to different courts. The judgment in such case might be affirmed or repealed in the circuit court, and reversed and remanded here, or *vice versa*. Not only so, but one and the same judgment

might be brought here directly from the probate court, and also indirectly through the circuit court from the court of probate, and be affirmed on one appeal and reversed on the other.

But a reference to these absurd possibilities is not needed to demonstrate—what counsel do not controvert—that no judgment can be twice appealed from, since the first appeal taken removes it out of the court rendering it, and into the court whose supervisory powers are invoked. Only one appeal, it is admitted, can be taken. But it is insisted that either party has an election, in the first instance to appeal to this court or to the circuit court. The result of this proposition necessarily is that either party may defeat the constitutional right of the other to have the damages assessed by a jury by the exercise of more diligence than the statute requires in perfecting an appeal to this court. This would be to put it in the power of the party who should be fleetest in the race in all cases to destroy the right secured by the organic law, and this, too, with respect to a matter in which the right cannot be made to depend upon diligence, except such as brings the party within the time allowed for the taking of the appeal. It might well be that the judgment of the probate court involved no semblance of error of law, but much ground for dissatisfaction on one side with the verdict of the preliminary jury. In such case, on a *pro forma* exception, his adversary, for no other purpose than to destroy the right to have a jury of 12 men pass on the question of damages, with no expectation or desire for a reversal of the judgment for error of law, might take a bill of exceptions, and on it prosecute an appeal to this court, and thereby as effectively defeat and deny the organic right, as if no attempt had been made in the statute to conserve it. It is no answer to say that the party desiring to go to a jury may do so by asserting his right to that end before his adversary moves the judgment into this court. The law does not contemplate such a scramble as this might well lead to in all cases. A right given without reasonable time for its exercise is essentially a right denied. A time prescribed which is to be tolled by the unfettered discretion of the adverse party, and may be terminated by him upon the instant it begins to run, is not a reasonable time within which to assert a right. This right is guarantied by the constitution. The statute intended to effectuate it prescribes one year as the period within which it may be exercised. Can it be said to be secured to the parties in a constitutional sense when, by virtue of another statute, it is forever lost, and this without any fault or laches on

Statute denies
right to jury
trial and is
unconstitu-
tional.

the part of him who desires to avail himself of it, unless it is claimed within a time—a minute or a moment it may be—in which its assertion is practically impossible? Can it be said that a statute which arms one party with the power to absolutely defeat and destroy a constitutional right secured to his adversary by another statute is a constitutional exercise of the legislative power? We think not. Such statute is, in our opinion, as essentially violative of organic law as if it had undertaken in terms to prohibit the assertion of the constitutional right. Section 3215 of the Code, taken in connection with section 3210 as amended, and section 3619 and 3640, and considered in the light of the rulings of this court in *Woodward Iron Co. v. Cabaniss*, *supra*, is just such a statute, in so far as it attempts to authorize an appeal to this court from the judgment of the probate court in a proceeding for the condemnation of land to public uses. We are constrained to the conclusion that that provision is unconstitutional. It is the only warrant for this appeal. With it, the appeal must fall, and the motion to dismiss the appeal is sustained. Appeal dismissed.

Eminent Domain—When Constitutional Right to Have Damages Assessed by a Jury is Infringed.—See *Ex parte Reynolds* (Ark.), 44 Am. & Eng. R. Cas. 60, note 56; *Kansas City, etc. R. Co. v. Story* (Mo.), 36 *Id.* 584, note 14 *Id.* 231.

What Constitutes a Legal Jury in Condemnation Proceedings.—Civil Code Colo. § 243 provides, that in condemnation proceedings the landowner may demand "a jury of six freeholders" to be drawn as provided in the succeeding sections. *Held*, that a jury of twelve called from a general panel in attendance in term time, is not a legal jury in such proceedings. And as such statute requires the jurors to be freeholders, it was error to overrule a challenge to one who testified that he owned personal property, but no mining property nor any house or land. *Colorado Cent. R. Co. v. Humphreys*, (Colorado, March 6, 1891), 26 Pac. Rep. 165.

Qualifications of Juror in Condemnation Proceedings—Juror Who has Acted in Former Panel.—Where a jury in condemnation proceedings disagree, and are discharged, the members of the panel are disqualified to sit as jurors in new proceedings to condemn the same land for the purposes mentioned in the first petition. Where in such case a juror, upon his examination as to his qualifications, denied having formed or expressed an opinion as to the necessity of taking the land for public use, and the contesting party was ignorant of his having acted as a member of the former panel, and of the submission of the question of such necessity to him as a member thereof, until after the second proceedings were ended, he is entitled to have the verdict set aside and to a new trial. *Hester v. Chambers*, 84 Mich. 562.

Special Questions to Jury in Condemnation Proceedings.—In Michigan, there is no provision in the statutes relative to condemnation proceedings, authorizing the submission of special questions to the jury. Accordingly, error cannot be predicated upon their not answering such questions. The same rule applies to commissioners. *Toledo, S. & M. R. Co. v. Campau*, 83 Mich. 31; s. c. 83 Mich. 33.

Sufficiency of Verdict of Jury Awarding Damages—Failure to Show Finding as to Benefits.—In Colorado, it is provided by statute (Code Civ. Proc. § 254) that in eminent domain proceedings, the verdict of the jury awarding damages shall state a description of the land taken with its value; the damages, if any, to the residue; and the amount and value of the benefits. The judge, although requested to instruct the jury that their verdict should be in the language and form provided by statute, declined to do so, and the verdict of the jury failed to state the amount or value of the benefits, if any, as provided by statute. *Held*, that the judgment should be reversed. *Denver & R. G. R. Co. v. Stark*, (Colorado, May 7, 1891), 26 Pac. Rep. 779.

Qualification of Commissioners to Assess Damages—Action by Two Commissioners out of Three.—The Ill. Em. Dom. Act, requires the appointment of three commissioners to fix compensation, assess damages, etc. The fifth section of the act requires the commissioners appointed to be sworn, and then to meet at a time and place fixed, and then proceed to fix compensation, etc. *Held*, that the commissioners must all qualify, meet, and hear the evidence, and if the record fails to show a compliance with the statute in this respect, the order is a nullity. If only two commissioners are sworn to discharge their duties, and the report is signed by only two of them, and the record fails to show that the third one was ever sworn to act as a commissioner, or that he ever did act as such, it is insufficient to divest title. *Ohio & M. R. Co. v. Barker*, (Illinois, Nov. 5, 1890), 25 N. E. Rep. 785. For a note upon the qualification by oath of commissioners, jurors, and viewers to condemn land and assess damages, see *ante*, p. 46.

STATE *ex rel.* FARMER

v.

GRAND ISLAND & WYOMING CENTRAL R. CO.

(*Nebraska Supreme Court, Jan. 20, 1891.*)

Eminent Domain—Mandamus to Compel Payment of Award.—In an application for *mandamus* to compel a railway company to deposit with the county judge the amount of an award to the relator for damages on account of the location and operation of the railway across his premises, it appeared in evidence that the right of way had been appropriated and used, and the award duly made, under § 97, chap. 16, Comp. St., from which no appeal had been taken, and the amount not deposited, as required by statute. *Held*, that the relator take his writ to enforce the duty against the railway company.

MANDAMUS.

Robert Ryan, for relator.

Marquett, Deweese & Hall, for respondent.

COBB, C. J.—This proceeding is brought by the relator for *mandamus* against the Grand Island & Wyoming Central Railroad Company to pay for its occupation and right of way of the relator's land, described as the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 6, township 22 N., range

Case stated.

25 W., sixth principal meridian, in Blaine county, under § 97, p. 305, Comp. St., which provides: "If the owner of any real estate over which any railroad corporation may desire to locate their road shall refuse to grant the right of way through his or her premises, the county judge of the county in which said real estate may be situated, as provided in this subdivision, shall, upon the application of either party, direct the sheriff of said county to summon six disinterested freeholders of said county, to be selected by said county judge, and not interested in a like question, unless a smaller number shall be agreed upon by said parties, whose duty it shall be to carefully inspect and view said real estate, and assess the damages which said owner shall sustain by the appropriation of his or her land to the use of said railroad corporation, and make report in writing to the county judge of said county, who, after certifying the same under his seal of office, shall transmit the same to the county clerk of said county for record, and said county clerk shall file, record, and index the same in the same manner provided for the record of deeds in this state, and such record shall have the like force and effect as the record of deeds, in pursuance of the statute in such cases made and provided; and if said corporation shall, at any time before they enter upon said real estate for the purpose of constructing said road, pay to said county judge for the use of said owner the sum so assessed and returned to him as aforesaid, they shall thereby be authorized to construct and maintain their said road over and across said premises: provided, that either party may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated, within sixty days after such assessment; and in case of such appeal the decision and finding of the district court shall be transmitted by the clerk thereof, duly certified, to the county clerk, to be filed and recorded as hereinbefore provided in his office; but such appeal shall not delay the prosecution of the work on said railroad, if such corporation shall first pay or deposit with such county judge the amount so assessed by said freeholders. Such railroad company shall in all cases pay the costs of the first assessment: provided, that if, on appeal, the appellant shall not obtain a more favorable judgment and award than was given by said freeholders, then such appellant shall be adjudged to pay all the costs made on such appeal: provided, further, that either party may appeal from the decision of the district court to the supreme court of the state, and the money so deposited shall remain in the hands of the county judge until a final decision be had, subject to the order of the supreme court."

Under this statute, application was made to the county

judge of Blaine county by the relator for the appointment of six disinterested freeholders of the county to appraise the damages to the lands described, and notice was given to the Grand Island & Wyoming Central Railroad Company that on February 15, 1889, James Hanna, James Loughron, F. N. Norton, Rush Minor, James McMillen, and William Rittenhouse, commissioners duly appointed by the county judge of Blaine county, would proceed to assess the damages accruing to the relator by reason of the appropriation of a strip of land for right of way upon and through the land hereinbefore described, which said commissioners made their report in writing to the county court that on February 15, 1889, the time fixed in the notices to the owners and interested parties, they together personally examined the several parcels and tracts of land and lots described, together with the improvements thereon, and upon such view assessed the damages which the owners and parties interested would sustain by the appropriation thereof: To George W. Farmer's timber culture entry, damages \$400. The relator alleges that he is a citizen and resident of this state, and has continuously for four years been in possession of the lands described, and that on March 9, 1885, he filed upon the same, under the laws of the United States, his timber culture claim of title thereto, and has ever since remained in possession, complying in all respects with the provisions of law granting title thereto, and fully expects to perfect his title to the same; that on July 15, 1886, the said railroad company entered upon his said claim, and appropriated six acres for its railroad purposes, without compensation to the relator, or *ad quod damnum* proceedings for that purpose. The answer of the railroad company, as respondent, admits that the relator has a timber claim filing on the land described, and had the same at the time of locating the line of railroad thereon; that at the time of the location the tract was wild and uncultivated, and what rights the relator had were unknown. The respondent admits that it has never paid the relator, or any one else, any consideration for its right of way, nor taken any steps of condemnation under the laws of this state, and denies that the damages for its appropriation and occupancy of the right of way have ever been legally determined under *ad quod damnum* proceedings, as provided by statute. The respondent sets up that it never had notice of the proceedings by commissioners appointed by the county judge of Blaine county awarding damages for right of way to the relator, and had no opportunity to offer objection to any of the commissioners, nor had it any notice of the time and place that such commission would inspect the premises and award the damages; that the commission was not legal

nor competent under the statute, but that three—Norton, Minor, and Rittenhouse—were not freeholders at the time of their appointment, assessment, and award, as required by statute, and that their proceedings were null and void; and, further, that the relator had no title, but merely a possessory right under the timber culture laws of the United States.

This cause was first heard at the September term, 1889, of this court, (27 Neb. 694, 44 Am. & Eng R. Cas. 189,) on the respondent's demurrer to the information on the grounds: *First*, that the relator has not legal capacity to sue; *second*, that the petition fails to state a cause of action; *third*, that the relator has a complete remedy at law. It was held in the opinion cited that if the allegations of the relator are true, that the railway is located and in operation across his premises, and if the damages have been lawfully assessed, the respondent is in duty bound to deposit the amount of the award with the county judge; and, further, that the relator claims possession of the land in question as a timber claim, not as the owner of the fee, but for injury to his possession he is entitled to compensation now, and presumably the damages awarded were for such injury; and also that, the amount of damages having been legally ascertained, it was unnecessary for the relator to bring an action to recover it, as *mandamus* would lie to enforce the performance of the duty against the railway company. The respondent cites the case of Union Pac. R. Co. v. Burlington & M. R. R. Co., 19 Neb. 389, wherein it was held in construing the

Former
opinion.

Union Pac. R.
Co., v. B. & M.
R. R. Co.

proviso to subdivision 28, § 69, chap. 14, that the five disinterested householders therein provided should be elected in pursuance of an order prescribing the manner of their election and compensation as assessors. That decision grew out of certain proceedings of the mayor and council of the city of Kearney in condemning the improved property of a citizen to extend one of the streets of the city through his grounds. The city had this power upon making adequate compensation to the citizen. And the proviso considered was in the words that "in all cases the city or village shall make the person or persons whose property shall be taken or injured thereby adequate compensation therefor, to be determined by the assessment of five disinterested householders, who shall be elected and compensated as may be prescribed by ordinance." An ordinance was passed, the first two sections of which declare the opening and extension of Nebraska avenue, and for that purpose the condemnation of certain land, describing it. The third section declared five persons, naming them, and describing them as "five disinterested householders of said city,

elected to determine by assessment the damages suffered by the owner or owners of said property through which the said street" was thereby opened and extended. There was no provision for compensating said freeholders; therefore their compensation would be fixed by the mayor and council after the performance of the services. The case turned upon the proposition that the naming of the five freeholders *in solido* in the ordinance was not an election of such persons in accordance with a provision therefor previously made as contemplated by the statute, which provision should also settle and provide for the compensation of such freeholders for the services to be performed by them. In that case there was a provision for notice to the owners of the property to be condemned. But, certainly, the legality of the ordinance appointing the freeholders as commissioners would not be settled or considered by them at their meeting to determine the amount of damages sustained by the property owners by reason of its taking, at which meeting, only, were such owners entitled to attend or be heard by virtue of such notice. To make that case applicable to the case at bar as an authority, there must have been an election of the five persons as freeholders pursuant to the provisions of an ordinance previously passed for that purpose. In such case, although it might have happened that one or more of the persons elected were lacking in the character of freeholder, yet if in their selection, and the framing and passage of the ordinance therefor, the statute above quoted was strictly pursued, the proceeding would be *strictissimi juris* in the sense in which that term was used in that case.

From the record it appears that the application of plaintiff to the county judge, as the initiatory proceeding for the assessment of damages, was strictly in accordance with the statute, and, so far as appears, the selection of the six freeholders by the county judge to act as the jury to assess such damages, the warrant for their summoning, and its service by the sheriff, were all in due form. It will be observed that the duty of selecting the six freeholders to serve as a jury in the appraisement of damages by § 97 of chapter 16 is one to be performed by a county judge upon the *ex parte* application either of the railroad company or the land owner. In either case it would seem that the jury then selected, is to appraise the damages to all the lands in the county which may have been taken without compensation, in the one case, or which the railroad company desired to take for use of its road in the other; and it is probably for this reason, and with regard to the fact that the application for the selection is, in nearly all cases, made

Complainant
entitled to
the writ.

by the railroad company, that the statute does not provide for the giving of notice in any case except where the railroad runs through the land of non-resident owners; and the notice required in such cases seems to be intended as a substitute for a personal application for a grant of such right of way without legal proceedings. But in all other cases a record is made up without necessary notice of attendance by the opposite party; and while the opposite party must take notice of the record when filed in the office of the county clerk, and either party may appeal from the assessment of damages, the record thus made cannot otherwise be attacked in a legal proceeding. I concede the contention of defendant that this is not a collateral, but a direct, proceeding; but one of the objects and purposes for the making of such record is that it may serve as the foundation for the relief to either party as provided by law. Besides in the mere setting of the law in motion by the initiatory application, it is scarcely proper, and certainly not necessary, that a party should be an actor in the making up of the record; the responsibility for it being thrown upon the county officers and the jury. Of course, in cases of fraud, the record may be impeached, but that must be in an action against the officers or persons guilty of the fraud. As to the allegation of the answer that damages awarded are greatly in excess of the damages recoverable by the plaintiff, it must be answered that appeal is the only remedy provided by statute in case of excessive award of damages. While, as above stated, the statute does not provide for notice to the opposite party of the time when the assessment of damages in such cases will be made, yet it appears from the record, and the return of the sheriff therein, that such notice was, in fact, duly served in the case at bar upon a local agent of the defendant. It appears that there is an adverse affidavit on file of the person who, as such agent, is shown to have been served; but evidence of that character is quite incompetent to disprove a record. The same may be said of the affidavit and admission relied upon to prove that some members of the jury were not in fact freeholders at the date of this selection. All other points in the case were decided when the case was before us on demurrer. The writ will be issued as prayed. Judgment accordingly.

The other judges concur.

Eminent Domain—Mandamus to Compel Deposit of Award.—*State v. Grand I. & W. C. R. Co.* (Neb.), 44 Am. & Eng. R. Cas. 189, note 192.

WAITE *v.* PORT READING RY. CO.VAN SICLEN *v.* SAME.

(*New Jersey Court of Chancery, July 10, 1891.*)

Eminent Domain—Entry on Lands—Time to Appeal.—Where condemnation proceedings are had under the general railroad law, the condemning company cannot tender and pay into court the amount of the award of the commissioners, and enter into possession of the lands sought, until the owner shall have had reasonable time to take an appeal from the commissioners' report.

Same—Reasonable Time for taking Appeal.—What is reasonable time for taking an appeal must depend upon the circumstances of each case. Sixteen days, under the circumstances of the cases considered, is not an unreasonable time for appealing.

ON orders to show cause why injunctions shall not issue to stay entry upon lands.

A. V. Schenck and Charles L. Corbin, for complainants.

John R. Emery and Ephraim Cutter, for defendant.

MCGILL, Ch.—These cases stand substantially upon the same footing, although they concern different complainants and entirely distinct properties. They were argued together, and they may properly be disposed of in Case stated. a single opinion. The defendant railroad corporation was organized under the general railroad law, (Revision, p. 925), and instituted proceedings under that law to condemn a right of way over the lands of the complainants. Commissioners were duly appointed, and, in pursuance of their duties, on the 31st day of March, 1891, they awarded to the complainant Waite \$3,110, for the value of a strip of his land, within the defendant's located route in Middlesex county, and the damages which he will suffer in other property by the construction of the proposed railroad; and to the complainant Van-Siclen \$1,982.50, for a strip of his land within the same route, in the same county. Upon the day on which the commissioners' report was filed in the clerk's office of Middlesex county, the amounts of the awards were respectively tendered to the complainants, each of whom refused to accept the sum tendered to him. The next ensuing term of the Middlesex circuit court commenced on the 7th of April, 1891. Upon the day after the circuit opened, no appeal having then been taken by either of the complainants, the sums tendered were paid into court. Eight days later, on April 16th, the complainant Van Siclen filed a petition appealing from the award

for his land, and on the following day, April 17th, the complainants also appealed from the award in his case. On the 21st of April the complainants each gave notice to the defendant of their respective appeals. On the 6th of May the defendant entered upon the land of Waite, and commenced work upon an embankment, which, when completed, will extend the entire length of the strip condemned, and be 6 7-10 feet high and 36 feet wide. On the 15th of May, Waite filed his bill to restrain the defendant from completing its embankment and railroad over his land. On the same day (May 15th) the defendant entered upon the land of Van Siclen, and commenced to deposit rails and ties upon it. The next day, May 16th Van Siclen filed his bill to restrain the defendant from constructing its railroad upon his land. At the time Waite's bill was filed the defendant had partially made its proposed embankment over the strip of land it sought to condemn from him, filling to the depth of 5 feet and breadth of 17 feet, for all but 30 feet of the length of the strip. It is observed, in this statement, that the only distinction material at this stage of these suits, between the two cases, lies in the facts that Waite did not file his bill until nine days after the defendant's entry upon his land, while Van Siclen filed his bill upon the day following the entry upon the land owned by him, and that during the delay in commencing Waite's suit the defendant expended money in building a considerable structure upon his land. It is claimed in Waite's case that so long a delay, in view of the fact that during it the defendant was expending large sums of money, raises a special equity for the defendant in this application, so far as Waite is concerned.

As common to the two cases, the single question presented at the argument was whether the defendant was entitled by law to possession of the lands in question at the time of its entry upon them. It is not disputed that the defendant's invasion of the lands is intended to be of that permanent and exclusive character which, in the absence of right in it to enter and possess them, justifies the interposition of this court by injunction in behalf of the complainant. By the constitutional interdict against legislation which may be designed to clothe individuals or private corporations with power to take private property for public use without just compensation first made to the owners, an owner is guaranteed possession of his land from takers for public use until he shall be paid for it. It is obvious that, where the owner of land and a taker for public use can agree upon that which is just compensation, effect can readily be given to this constitutional provision. But, often, because of the owner's absence or disability, or through mis-

Entry cannot
be made until
time to appeal
is given.

apprehension or greed, no agreement can be reached ; hence, in interest of public progress and accommodation, there is necessity for a legislative prescription of a legal proceeding by which that which is just compensation, in a given case, may be determined. And also, many times, disability, non-residence, or obstinacy rendered actual payment of such compensation, before the taking of land impossible, and hence there is need for the establishment of an equivalent for such payment. In the twelfth and thirteenth sections of the act under which the defendant is organized such necessary proceeding and equivalent are prescribed. Where the owner of land and a railroad company organized under that act will not agree, or where an agreement cannot be had between them because of the disability or absence of the owner, commissioners are appointed who, pursuing a defined course, fix the compensation to be made, and report their determination in writing. From this report either party in interest may appeal to a court, which, through the instrumentality of a jury, is to re-determine what is just compensation. It is apparent from its scope and language, that the statute has a triple design—*First*, to provide for the correct ascertainment of just compensation ; *second*, to authorize a substituted payment, where there can be no actual payment ; and, *third*, to expedite the acquirement of right to possession of the lands sought by a condemning company. In furtherance of the first of these purposes, the commissioners' award and an appeal therefrom are given, and in furtherance of the second the actual placing of the compensation determined, within the reach of the owner, is required ; and, to effect the latter of them, it is, in substance, provided that, when the amount of the compensation is determined and put within the control of the owner, the company may take possession of the land. Neither railroad company nor landowner is concluded by the action of the commissioners. Each has the right of appeal, and when appeal is taken the compensation is to be fixed anew by the verdict of the jury. Then, when an appeal shall have been taken, the award by the commissioners ceases to be the "just compensation." It is then no longer the proper sum to tender, and its payment into court will be without legal significance. The result of the appeal determines how much the "just compensation" is, and the sum to be tendered and paid. For this reason there must be delay in taking possession until the appeal shall be determined. Through the necessity for delay, thus made apparent, the appeal operates as a *supersedeas* upon the previous proceedings. This, in substance, is the construction put upon the statute in *Johnson v. Baltimore & N. Y. R. Co.*, 45 N. J. Eq. 454. 39 Am. & Eng.

R. Cas. 101, where an appeal was taken before the amount awarded by the commissioners had been paid into court. The cases before me differ from that case, in that here the appeal was taken after a tender and payment into court of the amount of the commissioners' award. Shortly after the payment into court, and before the defendant attempted to take possession of the land, the owner appealed. An important question is here presented, whether, under the circumstances stated, an appeal stays the right of defendant to possession of the land; or, put in another way, whether the legislature contemplated that, after the filing of the commissioners' report, possession of the land should be had or lost, according to the activity of the parties concerned in a condemnation proceeding, through an unseemly scramble between the owner and the company to ascertain whether the one can appeal before the other shall be able to tender the amount awarded and pay it into court.

I have already intimated that the legislative scheme was to secure the right of appeal, and at the same time expedite the condemning company in obtaining possession of the land. The intent manifestly was to permit the company to take possession of the land with reasonable expedition, but not so immediately as to defeat the owner from availing himself of the stay which appeal will secure for him. The unreported case of *Currie v. Railroad Co.*, referred to and followed in *Pomona B. R. Co. v. Camden & A. R. Co. (N. J.)*, 44 Am. & Eng. R. Cas. 179, presented this question. There the award, payment of its amount into court, taking possession of the land by the company, and appeal from the commissioner's report followed each other in quick succession, within a few minutes. Upon being applied to by bill, filed by the owner to restrain the company from constructing its railroad over his land, I adopted the construction of the statute pronounced in *Johnson v. Railway Co.*, *supra*; and, going further, held that, before possession could be taken after tender and payment into court, a reasonable time must be allowed for taking an appeal. Upon a review of my decision by the court of error and appeals it was sustained.

What is a reasonable time for taking an appeal must depend upon the circumstances of each case. I think, under the circumstances of the cases before me, that the appeals here concerned were taken within a reasonable time. A period of only 16 days elapsed, and that delay does not appear to have been more prejudicial to the defendant than a delay of one or two days would have been. When the appeals were taken the circuit court was yet open, and it was then as much within the power of the defendant

What is reasonable time to appeal.

to expedite the litigation as it would have been if the appeals had been taken upon the first day of the term. Convincing evidence of its ability to apply to the court lies in the fact that as late as the 26th of May the defendant unsuccessfully moved for the dismissal of the appeals upon the ground that they should have been taken upon the first day of the term. The fact that the defendant waited eight days before it paid the amounts of the awards into court does not change the situation. Both the complainants were *sui juris*, and each of them had refused the tender made to him. This mere refusal signified dissatisfaction and probable appeal, and warned the defendant to wait a reasonable time before acting upon the assumption that an appeal would not be taken. If the payments into court had been made after reasonable notice to the complainants to take their appeals, they might have had force growing out of the inequity of the complainants standing silent and inactive while the expenditure was being made. But there was no such notice. The defendant evidently relied more upon that which it regarded as its legal right than upon that which was due in the spirit of fairness. When it thought that the right to appeal had been lost, it paid the awards into court without notice of any kind.

The remaining question relates to the delay in the complainant Waite's application for injunction. The defendant's entry was in defiance of Waite's appeal, and, according to the uncontradicted affidavit of Mr. Waite, against his remonstrance. It may be that the nine days between the entry and the application to this court was more than ample time to prepare a bill with its verification, but I do not perceive that it so far exceeded reasonable bounds as to raise an equity for the defendant. Waite's appeal, followed by his remonstrance against the defendant's entry, so strongly marked his dissent to the entry that it is impossible, from a mere delay of nine days, during which a bill in chancery was in course of preparation, to infer a change in his attitude, and an acquiescence in the defendant's acts. The defendant expended its money against remonstrance and warning, and must be held to have done so at its peril. Mr. Waite does not now ask a mandatory injunction for the removal of the embankment. All he seeks is to restrain its completion, and the construction of a railroad over his land, and this he is entitled to, until he shall be duly compensated for the land taken. The orders to show cause will be made absolute.

Eminent Domain—Time for Taking Appeal.—See California, S. R. Co. 71. So. Pac. R. Co. (Cal.), 20 Am. & Eng. R. Cas. 309, note 24 *Id.* 295; Jamison v. Burlington, etc. R. Co. (Iowa), 27 *Id.* 413, note 30 *Id.* 273.

Appeal—Jurisdictional Amount.—In Virginia, where the amount allowed

for compensation for land taken, is less than \$500, the supreme court has not jurisdiction to review the judgment of the court below. *Richmond, F. & P. R. Co. v. Knopff*, 86 Va. 981.

Nor has the supreme court jurisdiction of an appeal from an award of a second board of commissioners, where the difference between such award and that of the first board to which the railroad company did not object, and which was set aside on the motion of the landowner, is less than \$500. *Atlantic & D. R. Co. v. Reid*, (Virginia, Nov. 20, 1890), 12 S. E. Rep. 222.

Jurisdiction of New York Court of Appeals in Condemnation Proceedings.—In New York the Court of Appeals has no jurisdiction to review a proceeding of the Supreme Court on the report of its commissioners in proceedings by a street railway company to acquire title to land. *In re Metropolitan El. R. Co.* (New York, June 23, 1891), 27 N. E. Rep. 1076.

Appeal from Order Approving Bonds for Damages.—In *Twelfth Street Market Co. v. Philadelphia & R. T. R. Co.*, (Pennsylvania, May 25, 1891), 21 Atl. Rep. 902, the plaintiff appealed from an order of the court of Common Pleas for the county of Philadelphia approving bonds for damages to property which was to be taken for a railroad. The bonds were given under the Pa. Act of April, 1856, requiring a railroad company before entering on property to give a bond conditioned to pay such amount of damages as the party may be entitled to. *Held*, that there was no appeal from this decision to the Supreme Court.

Appeal—Condemnation of Reservation in Conveyance of Land.—In Connecticut, it is held that the action of the railroad commissioners in condemning, on the application of a railroad company, reservations in a conveyance of certain land to such company as is allowed by statute, which land "interfered with the furnishing by such company of * * * proper depot accommodations," and in condemning land for additional tracks and depots, is not within § 3518, Gen. St. Conn., which provides that the person aggrieved by any order of the railroad commission on any proceedings "relative to the location, abandonment, or changing of depots," may appeal to the superior court, and an appeal therefrom will not lie. *Appeal of Cockerroft*, (Connecticut, March 20, 1891), 22 Atl. Rep. 482.

Appeal—Condemnation of Surface Over Mining Claim—Evidence—Rights of Owners to Surface.—In *Colorado M. R. Co. v. Croman*, (Colorado, April 27, 1891), 27 Pac. Rep. 256, it was held that the rights of the owner of a mining claim to the surface ground of his location are dependent on the relation which the vein, in its course and direction, bears to the surface, and where, on appeal by a railroad company from a judgment awarding damages in proceedings to condemn the surface over mining claims, the abstract fails to show the direction and course of the vein, the judgment will not be reversed on the ground that the evidence did not show certain rights of the owners of the mining claims to the surface.

Condemnation of Right of Way Through Land of Pre-emption Claimant Whose Entry has been Suspended.—When the entry of a pre-emption claimant has been suspended, and proceedings to condemn a right of way through the land for a railroad have been instituted, the claim of the railway company for a continuance of the latter proceedings pending the determination of the suspended entry by the department of the general land office appeals strongly to the discretion of the court. *Colorado Midland R. Co. v. Bowles*, 14 Colo. 85.

Right of Way Across Public Land—Judicial Notice of Company's Right—Map of Right of Way.—Where the issue is as to the selection and location by defendant railroad company of a right of way across public land, under Act Cong. July 2, 1864, and the defendant omits to plead the specific acts constituting the alleged location, the court cannot take judicial notice of the filing of the map of its route with the secretary of the interior on Febru-

ary 21, 1872, or that the route thereby fixed was its general route, and not its definite route, the fixing of which required further surveys, although the map by the filing became a part of the department records. *McKeoin v. Northern Pacific R. Co.* (C. C.), 45 Fed. Rep. 464.

Right of Railroad Company in Condemnation Proceedings to Set up Title in Itself.—A railroad company, in proceedings to condemn land, cannot at the same time, in the same suit and petition, set up a title in fee in itself, and ask an adjudication upon it, since its right to ask condemnation depends on the fact that the property belongs to another. *Colorado M. R. Co. v. Croman* (Colorado, April 27, 1891), 27 Pac. Rep. 256.

Action on Award Appraising Damages—Sufficiency of Complaint—Negating Defense.—Where a complaint in an action on an award appraising damages sustained by plaintiff from the building of a railroad across his land sets out his ownership of the land, that defendant, a railroad corporation, has constructed its road over his premises, and appropriated a way therefor, the appointment of commissioners by a court of competent jurisdiction, their award, and the failure of defendant to pay the same, a cause of action is stated, without negating any defense which defendant may have. *McKeoin v. Northern Pacific R. Co.* (C. C.), 45 Fed. Rep. 464.

Eminent Domain—Right of Railroad Company in Condemnation Proceedings to Take a Nonsuit.—A railroad will not be permitted in a condemnation to take a nonsuit against the defendant's consent, where the company has obtained possession of the land sought to be condemned for right of way, has built its road over it and is occupying it for its railroad by virtue of its condemnation proceedings. *Nevada & M. R. Co. v. De Lissa*, 103 Mo. 125.

Dismissal of Proceedings to Condemn Land—Right of Defendant to Writ of Restitution of Land.—In North Carolina, it is held that although a judgment dismissing proceedings to condemn land for a railroad right of way is affirmed on appeal, defendant is not entitled thereupon to a writ of restitution of the land, where plaintiff was in possession of it at the time the proceedings were begun, under a grant from a town, and not by virtue of any process of the court. *Durham & N. R. Co. v. North Carolina R. Co.* (North Carolina, March 10, 1891), 12 S. E. Rep. 983.

Indication of Land Required on Map or Plan—Application to Deviation from Original Line.—A company built its line to the termini mentioned in the charter and then wished to extend it less than a mile in the same direction. The time limited for the completion of the road had not expired but the company had terminated the representation on the board of directors which, by statute, was to continue during construction and had claimed and obtained from the city of K. exemption from taxation on the ground of completion of the road. To effect the desired extension it was sought to expropriate lands which were not marked or referred to on the map or plan filed under the statute. *Held*, affirming the judgment of the court below, that the statutory provisions that land required for a railway shall be indicated on a map or plan filed in the department of railways before it can be expropriated, applies as well to a deviation from the original line as to the line itself, and the company, having failed to show any statutory authority therefor, could not take the said land against the owner's consent. *Held*, also, that the proposed extension was not a deviation within the meaning of the statute, 42 Vic. chap. 9, § 8, sub-sec. 11 (D). *Kingston & Pembroke R. Co. v. Murphy*, 17 Sup. Ct. of Canada, 582.

Sufficiency of Map and Survey for Identification of Property Sought to be Condemned.—The question whether the map and survey required to be filed to designate the route of a railroad is sufficient for the identification of the property sought to be acquired by condemnation proceedings, without the aid of other maps or information, is a jurisdictional one, to be de-

terminated by the court on the application for the appointment of commissioners. *Toledo, S. & M. R. Co. v. Campau*, 83 Mich. 33. For a note upon the filing of maps and profiles in condemnation proceedings, see *ante* p. 36.

Right to Open and Close in Condemnation Proceedings.—In Texas in a proceeding by a railroad company to condemn a right of way, where the landowner makes no admission that the company has a good cause of action as set forth in its petition, it is error to allow the landowner to open and close the evidence and the argument, and because of such error, the judgment will be reversed. *Gulf, C. & S. F. R. Co. v. Ross* (Texas Ct. of App., April 23, 1890), 16 S. W. Rep. 536.

In seeking to condemn land, the party seeking condemnation, and not the owner of the land, is the party upon whom the burden of proof rests, and is the party entitled to open and conclude the argument. *Fort Worth, & R. G. R. Co. v. Culver* (Texas Ct. of App., Oct. 23, 1889), 14 S. W. Rep. 1013.

Costs in Condemnation Proceedings—"Action."—In Wisconsin, it is held that under Rev. St. Wis. 1878, chap. 129, awarding costs to a party in an "action," a proceeding by a railroad company to condemn lands is not such an action," and the landowner who successfully resists such proceeding is not entitled to costs for his expenses in defending it. *Wisconsin Cent. R. Co. v. Kneale* (Wisconsin, Feb. 24, 1891), 48 N. W. Rep. 248. The court said: "It would seem reasonable that the respondent should be compensated to some extent for his trouble and expenses in defending against the claim of the company, but the right to recover costs in any action or proceeding is a statutory right, and not a common law right. See *In re Carroll's Will*, 53 Wis. 228; *Potts v. Cooley*, 56 Wis. 49; *Baker v. State*, 69 Wis. 42. If, therefore, the statutes in regard to costs do not apply to a case of this kind, the court had no power to award them to the respondent. There is nothing in the act which regulates these proceedings which awards costs to the successful party, or to either party. The only other general statute declaring when costs may be awarded to a party is chapter 129, Rev. St. 1878. This chapter only awards costs to a party to an action. Is the proceeding by the railroad company to condemn lands for its use an action within the meaning of said chapter? This question has been answered by this court in the negative. *Cornish v. Milwaukee & L. W. R. Co.*, 60 Wis. 476, 17 Am. & Eng. R. Cas. 142; *Wisconsin Cent. R. Co. v. University*, 49 Wis. 162; *Milwaukee & N. R. Co. v. Strange*, 63 Wis. 182, 20 Am. & Eng. R. Cas. 413. These cases hold that a proceeding to condemn land by a railroad company is a special proceeding, and not an action, within the meaning of our laws in regard to actions and costs in such actions. We find no statute which authorizes the awarding of costs in special proceedings, unless it be in cases when such special proceedings are auxiliary to, or in some way connected with, an action at law or in equity, such as attachment, replevin proceedings, garnishment, or supplementary proceedings, or unless the statute giving the special proceeding authorizes the awarding of costs. The statute having omitted to provide for awarding costs in a proceeding of this kind, the court has no right to award them."

Same—Offer of Company to Confess Judgment for Part of Amount Claimed.—In Kansas, after a landowner appeals from the award of commissioners appointed to condemn real estate for the right of way of a railroad company, the proceeding in the district court becomes a civil action, and the railroad company may offer, under the provisions of § 528 of the Civil Code, to confess judgment for a part of the amount claimed; and if the landowner refuses to accept such confession of judgment in full of his demands, and upon the trial does not recover more than was so offered, he must pay all the costs of the railroad company incurred after the offer. *Chicago, I & K. R. Co. v. Townsden* (Kansas, April 11, 1891), 26 Pac. Rep. 427.

FARMERS' LOAN & TRUST CO.

v.

CANADA & ST. LOUIS R. CO.

(127 Indiana, 250.)

Mechanic's Lien—Action to Enforce—When Parties are Bound by Decree.

—In an action to enforce a mechanic's lien against a railroad, the case was submitted for trial with an agreement to allow all defenses to be given in evidence. The court made a finding that the road ought to be sold free from incumbrances to pay its indebtedness, and that the proceeds should be brought into court, with leave to all lien holders to establish their claims and their priority as a lien upon the proceeds, and that the rights of such lien holders ought to be transferred to the fund arising from the sale, followed by a reservation that the court reserves the determination of the amount of the several claims and liens, and their priority. These findings were followed by a final decree. *Held*, that this could not be considered as an interlocutory decree, and the parties were conclusively bound thereby.

Who are Sub-Contractors Within Meaning of Lien Law.—A laborer working by the day or a material man who delivers ties or lumber for the construction of a railroad, is not a sub-contractor within the meaning of the Indiana lien law.

Payment of Sub-Contractors—Material Men and Laborers—Tender.—A sub-contractor is bound to accept payment as provided in the contract with his principal; but if a proper tender is not made to him of the article in which he is to be paid, he may maintain an action for a money judgment. Material men and laborers, however, are not bound to accept anything in payment except money, whatever may be the contract between the contractor and the principal.

Sale of Railroad to Enforce Mechanic's Lien—Road as Entirety.—A continuous line of railroad is to be treated as an entirety and must be sold as such for the enforcement of a mechanic's lien.

Acquisition of Mechanic's Lien—Filing Notice in one County Only.—Although in enforcing a mechanic's lien a railroad must be sold as an entirety, it is not necessary that the lien should be acquired on every part of it. If the claimant does what the statute requires he obtains the lien; and by filing such a notice as the law requires in the county where the material was furnished or the work done, his lien extends to the entire line of the road in the state. In case of a sale of the road and a transfer of the lien to that fund derived by the sale by order of the court, the lien is transferred to the whole fund and not to a part of it.

Mortgage—Priority of Mechanic's Lien—Bona Fide Holder.—A mortgage of a railroad not yet built issued to raise money for construction, is junior to a mechanic's lien acquired in furnishing material for, or performing labor upon such railroad, which gave all there was of value to the property claimed under the mortgage, unless it is affirmatively shown that the holder of the mortgage bonds, which were assigned by the construction company, paid value for them before notice of such lien, and are in fact *bona fide* holders.

Distribution of Insufficient Fund Among Lien Holders—Right of Holder of General Lien to Question.—Where a fund in court is insufficient to satisfy all specific liens, a creditor having only a general equitable lien cannot

complain because one of the specific lien holders is decreed a greater part of the fund than he is entitled to as against other specific lien holders.

Same—Lien Payable out of Specific Part of Fund.—A mechanic holding a lien who was awarded his full claim out of a fund in court, cannot complain because it was not made payable out of the allowance made to another claimant of a part of the fund.

How Fraud Must be Found—Badges of Fraud.—Fraud must be found and stated in a special finding as an inferential and ultimate fact, and it is not enough to state the badges or evidences of fraud.

APPEAL from Elkhart Circuit Court.

W. L. Stonex, H. A. Gardner, and Gardner, McFadon & Gardner, for appellants.

E. E. Mummert, Wilson & Davis, Osborne & Zook, Vesey & Miller and Baker & Baker, for appellees.

ELLIOTT, J.—The appellant asserts a prior lien upon a fund derived from the sale of a railroad owned by the Canada & St. Louis Railway Company, and the appellees, other than the railway company, contest the claim of the appellant, asserting that they hold prior liens under the lien laws of this state. By motion in arrest of judgment, the appellant attempts to challenge the counter claims or cross complaints filed by the mechanics, material men, and laborers. Whether this attempt can prevail depends upon the effect of a decree made during the progress of the case. The recitals of the record material to the immediate point in dispute are these: "And now comes the plaintiff, and come also the defendants and cross complainants, and by agreement of parties, it is ordered that said complaint, and each of said cross complaints, shall be heard and determined by the court without pleadings or answers, the same as though each complaint and cross complaint had been fully and formally answered unto by said respective defendants therein, and it is agreed that all matters of defense, set-off, counter claim, and reply may be given in evidence, by any party against any other party, without further pleadings. And thereupon said complaint and cross complaints being at issue, under the agreement aforesaid, the same are severally submitted to the court for trial by agreement of all the parties; and the court, having heard the evidence, and being sufficiently advised in the premises, finds that the Canada & St. Louis Railway Company is indebted to said plaintiff in the sum of two hundred thousand dollars and more; that said plaintiff and said several cross complainants have and hold liens on said railway and its property and franchises for money due and owing for the right of way, for work and labor, for materials furnished, and by virtue of a mortgage executed by it to the Farmers' Loan & Trust Company of New York." We have no doubt that the agreement of the parties and the decretal order cut

off a motion in arrest of judgment. Where parties agree that pleadings are sufficient, they cannot afterward make any question upon them, except the question of jurisdiction of the subject. There is here an express agreement that the "complaint and cross complaints shall be heard and determined by the court," and, in the face of this agreement, the appellant cannot, after a final hearing, challenge the sufficiency of the cross complaints. Not only is there an express agreement to the effect stated, but there is also an agreement dispensing with further pleadings, and submitting the cause to the court for trial; thus clearly waiving all objections to the pleadings. This agreement was carried into effect by a trial pursuant to the agreement of the parties, and a judgment deciding the questions submitted to the court. Even in the absence of an express agreement, the voluntary submission of a cause for trial waives the failure to file pleadings forming an issue. *June v. Payne*, 107 Ind. 307; *City of Warsaw v. Dunlap*, 112 Ind. 576, 18 Am. & Eng. Corp. Cas. 263; *Hartlep v. Cole*, 101 Ind. 458; *Johnson v. Briscoe*, 92 Ind. 367; *Hege v. Newsom*, 96 Ind. 426; *Chambers v. Butcher*, 82 Ind. 508; *Lewis v. Bortsfeld*, 75 Ind. 390; *Felger v. Etzell*, *Id.* 417. The principle asserted in the cases cited fully authorizes our conclusion that the appellant is precluded from attacking the pleadings; that principle would, indeed, warrant us in going much further than it is necessary or proper for us to do in this instance.

Sufficiency of pleading—Estoppel to contest.

The decree from which we have copied is conclusive upon the parties, in so far as it adjudges that they are each and all holders of liens against the railroad. This appears in the extract we have already copied from the decree, and it is made still clearer by the recital, which reads thus: "And the court further finds that the Canada & St. Louis Railway, with all its rights of way, roadbed, depots, depot grounds, and all of its rights, franchises, and property, ought to be sold to make assets to pay its indebtedness and liabilities; and that the proceeds of said sale ought to be brought into court, with leave to all parties herein, and all other lienholders who may come in and become parties to the proceedings before the final hearing thereof, to establish their several claims, demands, and liens, and the respective lien of each, and the priority of the same, as a lien upon the proceeds of said sale. And the court further finds that said railroad property ought to be sold free and discharged of all liens and incumbrances, and the rights of all such lienholders and creditors ought to be transferred to the fund arising from such sale." These provisions of themselves make it plain that the court found that all the par-

Decree binding upon parties.

ties in court at the time the decree was entered were the holders of liens, but, if these provisions left any doubt upon the question, it would be removed by a provision in a subsequent part of the decree, which reads as follows: "And the court hereby reserves for its future consideration the consideration and determination of the amount of said claims and liens, and the respective lien of each, and the priority of the same as a lien upon the proceeds of the sale." One question is settled by this decree, namely, that all the parties have liens. Two questions are left undetermined, namely, the amount of the respective liens, and their priority. This decree was not objected to in any mode, but, on the contrary, was acquiesced in by the parties, and, as it was made upon a trial pursuant to the express agreement of the parties, it is conclusive upon them as to the questions tried and determined. It is said that the decree is interlocutory, and therefore not conclusive. We are not inclined to regard it as a mere interlocutory decree, inasmuch as it was made after the submission of the cause for trial, and after hearing the evidence, and is, in its nature, final, rather than interlocutory. It may not, perhaps, be true that it is final in such a sense as that an appeal would lie from it; but it has in many respects the qualities and effect of a final decree. But conceding, for the sake of the argument, that it is a mere interlocutory decree, still it must be held that as to this case, and upon the questions submitted for trial, and after trial fully adjudicated, it is final and conclusive. *Ray v. Law*, 3 Cranch (U. S.), 179; *Morey v. King*, 49 Vt. 304. In the case of *Fleenor v. Driskill*, 97 Ind. 27, this doctrine is carried much beyond the limits to which we carry it in this instance. We add, to prevent misconception, that we neither hold, nor mean to hold, that the decree in this instance was beyond change by the court while the proceedings were *in fieri*, nor do we hold that it would have constituted a conclusive adjudication had no final decree been rendered. All that we can with propriety decide is that, as to this particular case, it is conclusive because rendered after trial, and followed, without change, by a final decree.

The questions which remain for decision are those not adjudicated by the decree which we have considered and to which we have given a construction. The first of these questions arises upon the contention of the appellant that the appellees are subcontractors, and as such are bound to take payment in bonds for the reason that the principal contractors agreed to accept bonds in payment. It is probably true that one who in strictness occupies the position of a subcontractor is bound to accept payment as provided in the principal contract. *Stewart v.*

Who are subcontractors.

Wright, 52 Iowa, 335; Jones & Lumber Co. v. Murphy, 64 Iowa, 165; Stout v. Golden, 9 W. Va. 231; McKnight v. Washington, 8 W. Va. 666; Bowen v. Aubrey, 22 Cal. 566; Henley v. Wadsworth, 38 Cal. 356; Reeve v. Elmendorf, 38 N. J. Law, 125; Campbell v. Scaife, 1 Phila. (Pa.), 187. But the conclusion asserted by appellant requires another premise to make it valid, and that premise is that laborers and material men are subcontractors. This premise is assumed by appellant's counsel without proof, and we regard the assumption as an illicit one, for we do not believe that a laborer working by the day, or a material man who delivers ties or lumber, is a subcontractor, within the meaning of our lien law. We suppose a subcontractor to be one who takes from the principal contractor a specific part of the work, as, for instance, one who agrees with the principal contractor to construct 10 miles of a railroad out of a line of 20 or more miles, which the principal contractor had undertaken to build. Certainly, no other conclusion will harmonize with the doctrine long maintained by this court. Barker v. Buell, 35 Ind. 297; Colter v. Frese, 45 Ind. 96. Other courts have, more clearly than our own, marked and enforced the distinction between subcontractors and laborers, as well as between subcontractors and material men. Duncan v. Bateman, 23 Ark. 327; Huck v. Gaylord, 50 Tex. 578; Pitts v. Bomar, 33 Ga. 96.

If, however, we are wrong in holding that laborers and material men are not subcontractors within the meaning of our statute, still the appellant cannot succeed upon the point under immediate discussion. To entitle it to succeed, even upon its own theory of the law, it must show a proper tender of bonds; otherwise the claims of the lienors are payable in money, for money is the ordinary medium of payment, and is always demandable where there is no agreement providing for payment in property, as well as where there is such an agreement, but no tender by the debtor. Nipp v. Diskey, 81 Ind. 214; Ireland v. Montgomery, 34 Ind. 174; Parks v. Marshall, 10 Ind. 20; Mason v. Toner, 6 Ind. 328; Duerson v. Bellows, 1 Blackf. (Ind.), 217; Hancock v. Yaden, 121 Ind. 366; Vansickle v. Furgeson, 122 Ind. 450. It is unnecessary to decide whether, in such a case as this, a strict legal tender is required, or whether an equitable tender would be sufficient, for there was neither an offer to pay in bonds nor a tender of any kind.

The next question open to discussion, and requiring decision, is as to the extent of the lien of the laborers and material men. In order to properly consider this question, it is necessary to state the facts from which it emerges. The laborers and material men did work upon and furnished ma-

Payment of
subcontract-
ors—Tender.

terial for a part of the railroad and filed notices of liens. The railroad extends through several counties, and is a continuous line from a point in this state to a point in the state of Michigan. The contention of the appellant is that the railroad is an entirety, and that, as notices of liens were not filed in all the counties, no such lien was acquired as entitles the appellees to share in the fund derived from the sale of the entire road. We fully agree with appellant's counsel that a continuous line of railroad is to be treated as an entirety, and we adjudge that, as such, it must be sold; for it would be unjust to lienholders, as well as to the railroad company, to sell a bridge, a culvert, or a few rods, or even miles of the railroad. *Midland R. Co. v. Wilcox*, 122 Ind. 84, 43 Am. & Eng. R. Cas. 629; *Louisville, N. A. & C. R. Co. v. Boney*, 117 Ind. 501, 39 Am. & Eng. R. Cas. 168; *Muller v. Dows*, 94 U. S. 444.

But it by no means follows that, because the entire road must be sold, it is necessary that a lien should be acquired on every part of it. The right to enforce the lien necessarily requires a sale of the whole road, since it cannot be sold in fragments; but neither the right to the lien nor the mode of acquiring it is affected by this consideration. The acquisition of a lien results from a compliance with the requirements of the statute, and is not affected by the consequences which flow from its acquisition. If the claimant does what the statute requires, he obtains a lien, and, in order to enforce the lien, the law declares what shall be done, but over the question of enforcement the lienor has no control. If he obtains a lien in the authorized mode, he has a right to have it enforced as the law directs, and not otherwise. The claimant must undoubtedly do what the statute commands, but when he does this his right is complete, and subsequent considerations affect the mode of procedure, not the substantive right to a lien. The decisions in *Dano v. Mississippi, O. & R. R. Co.*, 27 Ark. 564; *Cox v. Western Pac. R. Co.*, 44 Cal. 18, 47 Cal. 87; *Knapp v. St. Louis, K. C. & N. R. Co.*, 74 Mo. 374, 7 Am. & Eng. R. Cas. 394; and *Cranston v. Union Trust Co.*, 75 Mo. 29, 11 Am. & Eng. R. Cas. 638,—are relevant to one branch of our discussion, for they affirm that a railroad must be treated as an entirety; but they are not relevant to the question whether a lien filed in one county entitles the lienor to invoke judicial aid for the enforcement of his right. They do not determine whether or not a lien may be acquired that will entitle the holder to enforce it, although it is acquired by filing notice in only one county. That we regard as the

Railroad must
be treated
and sold as
entirety.

How lien is
acquired -
Filing notice
in one county.

only question here, for the demand of the lienholder is to share in the fund derived from the sale of the entire road. There seems to have been no authoritative decision of the question in *Boston v. Chesapeake & O. R. Co.*, 76 Va. 180, 12 Am. & Eng. R. Cas. 263, although the reasoning of the court indicates that it was inclined to the opinion that notice must be filed in every county traversed by the road. We cannot assent to this reasoning, as it would break down the policy of our laws protecting laborers to require them to file notices in every county, for laborers whose claims were small could not afford to file notices all along the line of the railway. The consequence to which the reasoning would lead goes very far to prove it unsound. If it be true that notices must be filed along the entire line, then it must also be true that the laborer must follow the railway throughout all the states it traverses, even if it extended from seaboard to seaboard across the whole country; and, surely, it cannot be legally possible that he must pursue such a course. It seems clear to us that, if a lien is acquired in any county as the law directs, it is enforceable, as the law provides. If there is a lien upon any part of the railroad, it is enforceable against all the road, because all the road must be sold; but there is none the less a lien on this account. The acquisition of the lien is one thing, the mode of its enforcement another, and it does not follow that to acquire a lien the mode of enforcement must control the proceedings of the leinor, for with the question of enforcement he has no immediate concern until there is need of judicial assistance. The acquisition of the lien comes first; the question of its enforcement is an independent and subsequent consideration. The principle we enforce is not a novel one. It is almost as old as the common law itself, for it is involved wherever there is a lien for repairs upon personal property of an indivisible nature. In all such cases the entire thing must be sold, although the mechanic has improved or repaired only an insignificant part of it. If we are right in what we have said, it must follow that, if any valid lien at all was acquired, it entitles the lienholder to share in the fund brought into court for distribution. Whether any lien was acquired upon any part of the railroad depends upon the statute authorizing the acquisition of liens upon railroads. If the statute requires that notices be filed in every county, there is no lien upon the road; if the statute requires a notice in only one county, there is a lien extending to the entire fund, for the reason that the railroad is an entirety, and as such must be sold. This the doctrine asserted in the case of *Louisville, N. A. & C. R. Co. v. Boney*, 117

Lien attaches to proceeds of entire road.

Ind. 501, 39 Am. & Eng. R. Cas. 168, for in that case the notice was filed in one county, and yet it was held that the lien must be enforced against the road as an entirety. The authorities referred to in that case prove that where a judgment establishing what may be called a "personal liability" is obtained, it is to be enforced against the entire railroad, and not by the sale of an isolated part. *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Muller v. Dows*, 94 U. S. 444; *Alabama S. R. Co. v. Doe*, 114 U. S. 340, 20 Am. & Eng. R. Cas. 566; *Stewart's Appeal*, 56 Pa. St. 413; *Richardson v. Sibley*, 11 Allen (Mass.), 65; *Foster v. Fowler*, 60 Pa. St. 27. The same doctrine is declared and enforced in the case of *Midland R. Co. v. Wilcox*, 122 Ind. 84, 43 Am. & Eng. R. Cas. 629. There is nothing in the opinion in the case last cited which authorizes the conclusion that a notice of an intention to hold a lien must be filed in every county traversed by the railroad; on the contrary, a different rule was impliedly suggested, if not expressly declared. It was there said: "Where, as here, a line of railroad, although it extends through several counties, is treated in the contract and in the performance of the work under the contract as a continuous line of road, the contractors are not required, as against the railroad company, however it may be as to mortgagees or judgment creditors, to divide the road into parts corresponding to the counties it traverses, and enforce the lien in each county separately." It was not necessary to decide in that case what the rule is where mortgagees are interested, nor was it necessary to decide whether notice of a lien must be filed in every county where work was done only in one, and there was no decision upon those questions. It is not necessary to decide in this case whether, in cases where work is done in more than one county, notices must be filed in all the counties; for, as we understand the finding of the trial court, it was favorable to the appellant upon this question. We do decide, however, that, where a lien is obtained upon a railroad by filing such a notice as the law requires in one county, the lien thus created extends to the fund derived from a sale of the entire railroad pursuant to an interlocutory decree rendered after trial, and in cases where the parties by agreement submit the question to the court for trial at the intermediate hearing. We here adjudge that the general principle asserted in *Midland R. Co. v. Wilcox*, *supra*, applies to mortgagees, as well as to owners, and that a valid lien, once acquired, reaches the entire railroad as a unit. In the case of *Brooks v. Burlington & S. W. R. Co.*, 101 U. S. 443, it was held that, where a mechanic filed his notice within the time and in the mode

prescribed by the statute, he has, as against the mortgagee, a paramount lien upon the entire road. In disposing of the argument that the lien did not extend to the entire road, the court said: "The argument seems to us to be entirely too technical, and at war with the principle upon which liens are allowed for work done subsequently to the creation of a mortgage. That doctrine, or rather the statute which the court construed as giving a permanent lien, was in existence when the mortgage of the appellants was made. It entered into and became part of their contract. They knew that the road was yet to be built, and that, while such building would add to the value of their security, the law gave to the men whose labor and money built it a lien superior to that of the mortgage. Now that the venture in which both embarked is to end in loss to one or the other of them, there is no judicial propriety in straining the law to limit the rights of one party rather than those of the other. If that law, by its fair construction, gives the mechanic a lien for a few thousand dollars on the whole road instead of a part of it, the law should prevail." This reasoning clearly demonstrates the validity of the conclusion that a lien, once effectually acquired, fastens upon the entire road as a unit, and is not confined to mere detached parts of it. Any other rule would, as we have suggested, in many cases render the lien statute entirely nugatory, since it would preclude the enforcement of the lien, and in many other instances it would work great injustice to the stockholders of a railroad corporation. But there is another consideration not to be overlooked, and it is one which it must be presumed entered into the minds of the law makers. That consideration is this: The public has a right to have a railroad remain an entirety, and it would be destructive to public interest to permit it to be broken up into disjointed and practically useless fragments. *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 581, and authorities cited; *Midland R. Co. v. Wilcox*, *supra*, *vide*, page 95, 122 Ind., 43 Am. & Eng. R. Cas. 638. Sound policy and due regard for public welfare, as well as for the rights of individuals, require that a railroad shall be treated as an entirety, both as to the mode of acquiring a lien and as to the mode of its enforcement.

The remaining question may be thus stated: Is the lien of the appellant's mortgage superior to the liens of the appellees? In order to intelligently discuss this question, it is necessary to state the material facts out of which it arises. Those facts may be thus summarized: On the 28th day of May, 1888, the railway company entered into a contract with the Burns Construction

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to mortgages.

Company to build and equip its road. Burns was the president of the railway company, and also the general manager of the construction company. On the 28th of August, 1888, the railway company ordered the execution of a trust deed, and the instrument was written and signed in duplicate. One of the duplicates was delivered by Burns to the Farmers' Loan & Trust Company on the 18th day of October, 1888. The other was retained by the railway company. The bonds which the trust deed was executed to secure were retained by the company that executed the mortgage, but from time to time bonds were delivered to Burns upon estimates issued to him by the railway company's engineer. Ten of the bonds were transferred to William Dallin, and 66 were transferred to John Fitzgerald, a subcontractor. The remainder of the bonds, 364 in number, were hypothecated by the Burns Construction Company, but when, where, to whom, or for how much, is not shown. In considering the question of priority, one of the important things to be kept in mind is that the mortgage was executed upon property that had in fact no existence, for the railroad mortgaged had not been built. That there is a material difference between a case such as this, where the railroad has not been built, and a case where the railroad has been constructed, is so evident that no one can fail to perceive it the instant his attention is directed to the matter. As held in *Brooks v. Railway Co.*, *supra*, parties must, in such a case as this, be deemed to have contracted with reference to the existing condition of things so far as they were open to observation. The mortgagee must have known that its security was valueless as long as there was no road in existence, and it must have known, also, that labor, material, and money would be required to build the road. It was bound to know, too, what the law was, for, as said in *Brooks v. Burlington & S. W. R. Co.*, *supra*: "It entered into and became part of their contract." This general rule has been repeatedly declared and enforced by this court. *Carr v. State*, 127 Ind. 204; *Hancock v. Yaden*, 121 Ind. 366, (see page 370); *Long v. Straus*, 107 Ind. 94; *Bryson v. McCreary*, 102 Ind. 1; *Edwards v. Johnson*, 105 Ind. 594; *Bass v. Doerman*, 112 Ind. 390. In *Warren v. Sohn*, 112 Ind. 213, the principle we are discussing was applied to the case of a lien asserted by a miner, and it was held that the lien was superior to a mortgage. But the present case is much stronger than the one referred to, for here there was, in fact, no property in existence when the mortgage was made. The property upon which the mortgage finally fastened was created by the labor, materials, and money of the appellees. We are strongly inclined to doubt whether the mortgage lien would

be paramount, even if the bonds which the mortgage was executed to secure had been delivered before any notices of liens were filed. Very strongly reasoned decisions declare that the liens of the mechanics are superior to the lien of the mortgage, in cases where the mortgage is executed before the construction of the railroad. *Neilson v. Iowa E. R. Co.*, 44 Iowa 71; *Equitable L. Ins. Co. v. Slye*, 45 Iowa, 615. We need not, however, decide this question, but it is proper to say that, as the labor, materials and money of the appellees gave all there is of value to the property claimed under the mortgage, the mortgagee ought to show a clear and strong superior right in order to defeat the claims of those who in reality brought the property into existence. The doubt in our minds is whether the mortgagee's lien can in any event be justly held to be the prior one. We have no doubt that, if the mortgagee can succeed at all, it must be because it is shown clearly and strongly that the mortgagee is a *bona fide* purchaser. In our judgment the appellant has shown no such right as entitles it to the paramount lien. It is true that the trust deed or mortgage was placed in the hands of the mortgagee or trustee before some of the notices were filed, but the instrument securing the bond was a mere shadow; for, had no bonds ever been delivered to *bona fide* holders, the instrument would never have been effective against these lienholders. We are far within the authorities in asserting this, as they carry the doctrine much further. *Hough v. Osborne*, 7 Ind. 140; *Garrett v. Puckett*, 115 Ind. 485; *Hubbard v. Harrison*, 38 Ind. 323; *Felton v. Smith*, 84 Ind. 485, see page 495; *Reeves v. Hayes*, 95 Ind. 521; *Day v. Bowman*, 109 Ind. 383; *Midland R. Co. v. Wilcox*, *supra*.

The delivery of the mortgage or trust deed alone did not destroy the priority of the liens of the appellees, for the delivery of such an instrument cannot of itself defeat equitable or legal claims; since it is essential that one who asserts a right against a legal or equitable claim should show that he parted with value before notice of such equitable or legal right. *Anderson v. Hubble*, 93 Ind. 570, and cases cited; *Hunsinger v. Hofer*, 110 Ind. 390. This is the rule in ordinary cases, and, certainly, it must govern a case like this, where the mortgagee seeks to defeat the claims of those whose labor, materials, and money created the property which it is sought to subject to the lien of the mortgage. The mortgagee must succeed, if at all, as a *bona fide* holder of bonds, executed under the mortgage. It cannot, as against the claims of the laborers, mechanics, and material-men, be deemed a *bona fide* holder, unless it affirmatively shows that it

paid value for the bonds before notice of the liens. The rule in analogous cases is well settled in this state, and the strong equities of the appellees call for its liberal application in this instance. *Giberson v. Jolley*, 120 Ind. 301; *First Nat. Bank v. Ruhl*, 122 Ind. 279. There is reason for saying that it was the duty of the party buying the bonds to ascertain whether a lien had been placed on the property prior to the time of his acquisition of those instruments, but we do not go as far as that in this case. *Woodbury v. Fisher*, 20 Ind. 387. We are not here seeking a general rule that shall apply to every case resembling the present, nor do we attempt to lay down any such rule. We simply adjudge that in such a case as this the mortgage cannot prevail over laborers and material-men without showing that it is a *bona fide* holder of the principal debt in all that the term "*bona fide* holder" implies. It cannot, in a case like this, where there was no railroad in existence when the mortgage was delivered, be deemed a *bona fide* holder, as against laborers, mechanics, and material-men, without showing that, before notice of the acquisition of the liens under the statute, a fair value was paid for the bonds. The purchase of negotiable instruments at a price much less than their value may be, in some instances, evidence tending to show that the holder had knowledge that the instruments were not obtained or transferred fairly or honestly. *Schmueckle v. Walters*, 125 Ind. 265. To such a case as this that rule applies, for justice demands that the claimant of a superior lien should at least affirmatively show that a fair price was paid for the bonds before notices were filed under the lien law. If the Burns Construction Company, the principal contractor, had become and remained the owner of the bonds in absolute good faith, it could not have defeated those from whom it purchased materials, nor those whom it employed to do work upon the railroad. It is very clear that a principal contractor cannot defeat the liens of those whose debtor he is for work and materials, by asserting the lien of a mortgage executed by the owner, by whom he was employed to build a house, a mill, or a railroad. To deny this would be to affirm that the principal contractor may leave his workmen unpaid, and, for his own benefit, exhaust the property which supplies the chief security of all. The plainest principles of equity require that the contractor shall not be allowed to defeat the liens of laborers, mechanics, or material-men by asserting a lien superior to theirs, no matter how that lien may be acquired. The delivery of the bonds to the Burns Construction Company did not, therefore, vest title so as to cut out the appellees; and unless the appellant acquired the bonds as a *bona fide* holder, after

the delivery to the Burns Company, it cannot prevail against the appellees. If it is the mere assignee of the Burns Company, it cannot defeat the lien holders, for, as a mere assignee, it can hold by no better title than its assignor; hence it is evident that the only capacity in which it can by any possibility succeed is that of a *bona fide* holder of instruments negotiable under the law-merchant. The cases of *Choteau v. Thompson*, 2 Ohio St. 125; *Crowell v. Gilmore*, 18 Cal. 370; and *Preston v. Sonora Lodge*, 39 Cal. 116,—are not relevant to the point in dispute. In those cases there was no question as to the creation or purchase in good faith of the debt evidenced by the mortgage under which the superior lien was asserted, so that granting (but by no means deciding) that the doctrine asserted by those cases is sound, still it does not control this case; for here the question is whether the appellant, having acquired title through a party who, as against his own employes and subcontractors, could not be a *bona fide* holder of the negotiable instruments, can defeat the prior equities of such persons without showing that it paid value for those instruments before the equities, in the form of statutory liens, fastened upon the mortgaged property. If the Burns Construction Company had occupied the position of a *bona fide* holder of the bonds, in the full sense of the term, then the appellant would be in a much better position; but as we have suggested, until it climbs to a higher place than that of a mere assignee of the Burns Construction Company, it has no legal or equitable rights greater than those which resided in its assignor. The Burns Company could not have defeated its own employes and subcontractors, and its assignee stands in its place. We do not doubt that, in cases where all is fair and there is no wrong practiced, the presumption is, as against the maker of a negotiable instrument, that the holder paid value for the instrument of which he shows himself to be the owner. *Collins v. Gilbert*, 94 U. S. 754; *McCurdy's Appeal*, 65 Pa. St. 290; *Duncan v. Gilbert*, 29 N. J. Law, 521; *Vallette v. Mason*, 1 Ind. 288. But, even as against the maker of such an instrument, where there is fraud, the rule is different. *Giberson v. Jolley*, *supra*; *Harrison v. State Bank*, 28 Ind. 133.

It is, however, unnecessary to enter upon a consideration of that general subject, for the question here is not as to the right of a maker of a negotiable instrument to defend; but the question with which we are here concerned is, what equities shall prevail, and in what order shall a fund in the hands of the court be distributed to different classes of claimants? It is evident, therefore, that the presumption which obtains in ordinary cases cannot prevail where those whose labor and

materials brought the mortgaged property into existence are asserting liens against a mortgagee claiming under the principal contractor by whom the mechanics and laborers were employed. In order to defeat the strong equities of the lienholders, there must, upon every principle of justice, be evidence that fair value was paid for the bonds; for, when it is made to appear that the railroad existed only in the minds of its projectors at the time the mortgage and bonds were placed in the hands of the original contractor, there is no foundation for the presumption which prevails where no element of fraud or unfairness taints or poisons the transaction. Whatever may be said of such cases as *Dunham v. Cincinnati P. & C. R. Co.*, 1 Wall. (U. S.), 254, and *Galveston, H. & H. R. Co. v. Cowdry*, 11 Wall. (U. S.), 459, in view of the later cases in the same court to which we have referred, it is, at all events, safe to affirm that they are not of controlling influence in a case such as this, where it affirmatively appears that the bonds were pledged by a principal contractor, who could not, without a violation of good faith, make the bonds to the injury of the laborers and mechanics employed to build the railroad. It may also be said of those cases that there was affirmative evidence that full value was paid for the bonds, and no question arose upon that point. Our ultimate conclusion is that the appellees were justly adjudged to have the prior lien upon the fund derived from the sale of the railroad. No other conclusion will, as we believe, give just effect to our statute awarding liens to laborers, mechanics, and materialmen.

Cross-errors alleged by some of the appellees present questions which require consideration. The first of these questions arises on the claim put forward by counsel that the transaction between the Burns Construction Company and the railway company was a fraud upon the rights of the creditors. While there are circumstances indicative of fraud, there is no finding that there was fraud in fact, and hence the complaining appellees are not entitled to judgment upon the ground that the transaction was a fraud upon their rights. It is settled by our decisions that fraud must be found and stated as an inferential or ultimate fact, and that it is not sufficient to state badges of fraud or the evidences of fraud in a special finding. *Cicero Tp. v. Picken*, 122 Ind. 260; *Kirkpatrick v. Reeves*, 121 Ind. 280; *Wilson v. Campbell*, 119 Ind. 286; *Phelps v. Smith*, 116 Ind. 387; *Bartholomew v. Pierson*, 112 Ind. 430; *Stix v. Sadler*, 109 Ind. 254; *Elston v. Castor*, 101 Ind. 426.

The second of the questions presented by the assignment of cross-errors arises on the order made allowing the claim of

Finding of
fraud.

the subcontractor, John Fitzgerald, and giving it an equal place with other claims secured by liens, to the exclusion of unsecured claims. In our judgment, the trial court did not err to the prejudice of the complaining unsecured creditors, for, if Fitzgerald's claim should be cut down as they insist, still as he was, at all events, a lienholder, they cannot have priority over him to the exclusion of the appellant. If his claim were cut down, the appellant would undoubtedly be entitled to the benefit, for after the payment of the prior lienholders it has the superior claim. If the amount realized from the sale of the railroad had been sufficient to pay the appellant and all other lienholders, there would be plausibility in counsel's position; but, as the amount derived from the sale was not sufficient to discharge all the liens, their position is untenable. It seems quite clear that, where a fund brought into court for distribution is insufficient to satisfy all specific liens, a creditor having only a general equitable lien cannot complain because one of the specific lienholders is decreed a greater part of the fund than he is entitled to as against other specific lienholders.

Distribution
of fund—Gen-
eral and
special lien.

The question presented by the contention of Charles Trainor must be decided against him. His contention is that, although he was allowed his claim, yet there was error because it was allowed out of the general fund, and not out of the part allotted to the subcontractor, Fitzgerald. This contention cannot prevail, for the reason that, where a mechanic is awarded all he is entitled to out of a fund in court, he cannot be heard to complain because it was not made payable out of the allowance made to another claimant of the fund. If his claim is satisfied, he is in no plight to ask anything more. It is true that creditors may obtain a general equitable lien as against an insolvent corporation, upon funds brought into a court of chancery for distribution. *Curran v. Arkansas*, 15 How. (U. S.), 312; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, *Id.* 56; *Wood v. Dummer*, 3 Mason (U. S.), 309; *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493. But this equitable lien prevails against the corporation and its shareholders, and not against lienholders who have specific prior liens upon the corporate property created before the court received the fund. The difficulty which counsel cannot here surmount grows out of the fact that specific liens existed against the property converted into the fund, for, where such specific liens exist, they outrank mere general equitable liens, and the order of priority is time. *Paxton v. Sterne*, 127 Ind. 219. It is evident from what has been said that the rule which governs where the contest is waged between share-

Same—Fund
out of which
claim is
allowed.

holders and creditors cannot apply where the controversy is between the holders of specific liens acquired before the conversion of the property into an equitable fund and creditors who have a mere general equitable lien upon the fund. This principle is decisively against the appellees who assign cross-errors. Judgment affirmed.

Mechanic's Lien Attaches to Road as Entirety.—*Midland R. Co. v. Wilcox* (Ind.), 43 Am. & Eng. R. Cas. 629, note 641. As to necessity for filing lien in every county, see *Boston v. Chesapeake & O. R. Co.* (Va.), 12 *Id.* 263.

Priority of Mechanic's Lien over Mortgage.—See *Toledo D. & B. R. Co. v. Hamilton* (U. S.), 43 Am. & Eng. R. Cas. 476, note 484.

Subcontractor's Lien—Delivery of Materials Outside of State.—In *Thompson v. St. Paul City R. Co.* 48 Minn. 13, it was held that under the provisions of § 1, chap. 90, Gen. St. 1878, (now repealed), which gave a lien to a subcontractor who furnished materials for the construction, alteration, or repair of any line of railway in this state, it was not essential to an enforcement of the lien that said materials should have been furnished or delivered by the subcontractor within the limits of this state. The court said: "Of course, under our statute, the case now before us must be considered precisely as if plaintiffs' agreement had been made with the defendant directly, and no original contractor had stood between the parties; precisely as if, under a like contract made in the same place, plaintiffs had furnished and delivered their materials to defendant without the state, and that subsequently, and as intended, they had been shipped into and put in use by defendant within the state. In *Birmingham I. Foundry v. Glen Cove S. M. Co.*, 78 N. Y. 30, the facts, as stated, were about the same as in this case, although it does not appear, and, possibly, is not important, that the subcontractor, plaintiff, did its work and delivered its material with reference to the contract in hand, or with any knowledge of the special purpose for which the material was designed. The chief contractor failed to pay, and the plaintiff brought its action to enforce its claim for a lien in a state other than that in which it had its legal residence, and in which the subcontract had been made, and the property delivered. It was held under a statute as broad as our own that the plaintiff could not recover; that the lien was no part of the contract to be enforced where the contract could be enforced; that the statute was intended solely for the benefit and protection of those who performed labor or furnished material within the state of New York; and that, as the plaintiff did not furnish any material within the state, it could not have the benefit of a statute which had no extraterritorial force. With great respect for the conclusions of so eminent a court as that which rendered this decision, we are of the opinion that too restricted and limited a view was taken of the subject. It is settled that it is immaterial that the contract was made in another state, (*Atkin v. Little*, 17 Minn. 342, *Gil.* 320; *Gaty v. Casey*, 15 Ill. 189;) and there should be no doubt but that the law-makers could, if they chose so to do, confer upon those who by contract furnish and deliver materials outside of the boundary lines of our state, designed for use within our borders, and especially where they have been brought and used herein, the right to a lien upon the premises for which the materials were intended, or have in fact become a part. The property to be affected by a lien statute is in the state, and wholly within its jurisdiction. The liens can only be enforced by the process and decrees of our courts, and nothing would stand in the way of their complete enforcement. Such a law would do no more than to prescribe the effect in this state of a combination of certain facts, part of which trans-

pired in a sister state. The effect would be entirely within the boundaries of this state, and it would seem to follow that this effect could not, in any sense be deemed extraterritorial. If, therefore, the law-makers possessed the power to enact such a statute, and authorize a lien, the inquiry is, have they done so? The law under which the plaintiff bases its claim for such lien (§ 1, chap. 90, Gen. St. *supra*), does not in terms (nor by implication can it be said) restrict the right to cases wherein the material has been purchased or actually delivered within the state. But, upon the other hand, the language used is broad and ample enough to include all who may furnish materials, whether delivered within or without the limits of our state. We are of the opinion that it does, and that plaintiff is entitled to the relief demanded. *Fagan v. Boyle Ice Machine Co.*, 65 Tex. 324. See, also, *Atkins v. Little*, *supra*. As was said in the Texas case, there is no valid reason why the manufacturer in another state should have a lien when he delivers his materials within the state in which they are to be used, and deprived of a lien when the delivery is at his factory. A distinction of this nature is altogether too narrow and technical unless made by the statute itself. The finding complained of was not essential to a recovery by the plaintiff."

FRONT STREET CABLE R. CO.

v.

JOHNSON *et al.*

(*Washington Supreme Court, February 11, 1891.*)

Mechanic's Lien—Whether Maintainable on Street Railway.—A lien for labor performed cannot be maintained upon a street railway under chap. 138, § 1957, Code Wash., giving a laborer's lien upon a "railroad" or "any other structure" and the land upon which it is erected.

APPEAL from King Superior Court.

Struve, Haines & McMicken and *James Kiefer*, for appellant.
McGilvra, Blaine & Devries, for appellees.

STILES, J.—The decree from which this appeal was taken established that the appellees were entitled to the foreclosure of their numerous lines upon the cable railway of the appellant on Front and other streets, in the city of Seattle, and the power house connected with the railway, and the machinery connected with the power house, and ordered the sale of the same or so much thereof as might be necessary to raise the amount due the appellees. The liens thus adjudicated had been filed against the railway, etc., for labor performed at the instance of a sub-contractor in connection with the construction of the concrete roadbed laid in the streets for the reception of the rails. Numerous questions growing out of the lien statutes of this state were pertinently raised by the record, but underlying all the others is that as to whether a lien can be maintained upon a street railway

Case stated.

under chapter 138 of the Code. With this point resolved in the affirmative, we should be required to review the case further; but if it is decided in the negative, the judgment establishing the lien and ordering a sale must be reversed. Section 1957 specifies the structures upon which an unpaid laborer may have a lien. One of these is a "railroad;" another is, "any other structure." The lien is given upon the structure, and the land upon which it is erected, and, unless there can be a lien upon the land, there can be none upon the

structure. This position was taken in the case of *Kellogg v. Littell & S. Manuf. Co.*, (Wash.) 25 Pac. Rep. 461, (decided at the last session of this court.)

Therefore, to authorize a lien in the case of a street railway, it would be necessary that the person who caused the railway to be constructed have some estate in the land over which it was laid. This it could not have, as the fee of the streets of Seattle is in the city for the public use, the general public having the easement of use, and the municipal authorities having power to grant only a license to street-railway builders to occupy and use, as a part of the public easement, such portions of the streets as is necessary to the operation of their cars. Acts 1885-86, p. 244. The street railway company owns the structure laid by it on the highway, and a franchise to collect fares. *Pierce, R. R.* 252. The license of the street railway company is not a distinct easement. *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515. And it creates no additional burden upon the land for which abutting owners are entitled to compensation, unless there are special reasons therefor. *Elliott, Roads & S.* 558; *Mills, Em. Dom.* § 205; *Lewis, Em. Dom.* § 124; *Ror. R. R.* 1425. Being unable to find, therefore, that a street railway is such a "structure" as the statute contemplates, the conclusion follows that the right of the lien does not exist. We deem it to be a clear proposition, also, that these "railways" are not "railroads," according to the usual and ordinary meaning of the word, to which reference must be had for the interpretation of a statute. The difference between these two valuable instruments of public convenience was clearly pointed out in the earlier days of street railways, in a contest for the possession of some of the streets of the city of Louisville, Ky., between a railroad company and a street railway company. The case reported is that of *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky), 175. The legislature of Kentucky, in 1860, in furtherance of a certain railroad enterprise in which the state had an interest, enacted that "no other railroad" should be constructed in certain streets in the city of Louisville. Later, a street railway company

No lien upon street railway.

was organized, and, under license from the city of Louisville, commenced to lay its tracks on some of the streets mentioned in the act of 1860. The railroad company sought to enjoin the new company, on the ground that its rights under the act of 1860 were being violated. This brought up the question whether the street railways proposed to be built were "railroads," within the meaning of the statute, and the Kentucky court of appeals, holding them not to be, refused the injunction. In its decision the court said: "A 'railroad' and a 'street railroad' or 'way' are, in both their technical and popular import, as distinct and different things as a 'road' and a 'street,' or as a 'bridge' and a 'railroad bridge.' * * A street railway is not, in either the popular or legislative sense, a railroad." This case is cited with apparent approval in 2 Ror. R. R. p. 1422, and in Elliott, Roads & S. p. 558, and we agree with the views there expressed. For these reasons the decree must be reversed as to the appellant, and the cause as against it dismissed. And it is so ordered. Costs to appellant.

ANDERS, C. J., concurs.

DUNBAR, J., concurs in the result.

HOYT, J., did not sit at the hearing of this cause, he being disqualified.

SCOTT, J., (*dissenting*).—I concur to the result as to all the appellees excepting Brown and Johnson, on the ground that except as to these two there was no proof by the lienors that their claims had not been paid. I think that in a case like this, where the claimants had contracted and dealt with another than the owner of the property in relation to the matters out of which their claims arose, the burden of proof was upon them to show that the respective sums claimed were still due and owing them, as these were matters as to which the owner might and probably would have no knowledge, and that such circumstances are sufficient to take it out of the general rule in relation to the proof of payments. While payment is usually an affirmative defense, yet, where the property of a third person is attempted to be taken by operation of law to satisfy a claim against another party, the plaintiff should prove all facts necessary to entitle him to the relief prayed for. Lien claimants are required to swear that the amount claimed is justly due in order to obtain a lien, and they shall also be required to prove their claim at the trial in cases like this. I can see no reason why a lien cannot be had and enforced on a street railway, including such franchise or right of way as may be connected therewith in the

use of the street itself, under chapter 138 of the Code, without any strained construction or interpretation of its provisions; and the case of *Kellogg v. Littell & S. Manuf. Co.*, (Wash.) 25 Pac. Rep. 461, cited, does not conflict therewith. The company certainly had the right to operate its road on the streets where it was laid. It would not be contended that a lien cannot be had on a building erected by a lessee on leased land, together with the right of the lessee in the land itself, in so far as the same should be necessary to the use of the building, where the lessee had the right to erect and use the building, and there is little difference in principle between such a case and this one. As to Brown and Johnson, I think the judgment should have been affirmed.

A Street "Railway" is Not Always a "Railroad."—*Thomas & Houston Electric Co. v. Simon*, (Ore). *ante*, p. 51; note 46 Am. & Eng. R. Cas. 229.

Mechanics' Liens Upon Street Railways.—In Missouri it has been held that a statute giving a lien to contractors and others, upon the roadbed, etc., of railroads, applies to horse railroads laid over the streets of cities, as well as to railroads used for steam carriage between distant parts. *St. Louis Bolt & Iron Co. v. Donahoe*, (not reported in full) 3 Mo. App. 559.

In the case of *Fleming v. St. Paul City R. Co.*, *post*, it appears that a mechanic's lien was filed against a street railway without controversy as to the right to do so.

FLEMING

v.

ST. PAUL CITY R. CO.

(*Minnesota Supreme Court, Aug. 24, 1891.*)

Mechanic's Lien—Street Railway—Sufficiency of Description of Property.—The statutory requirements, that the affidavit for a mechanic's lien describe the property for the improvement of which labor or material may have been furnished, is not complied with by stating generally that it was for a line of street railway owned by the defendant in a city named, it appearing that the defendant had several lines of railway, to either of which such designation would be equally applicable.

Same—Same—Sufficiency of Affidavit.—The requirement that the affidavit state "to and for" whom labor or material may have been supplied, and the contract relation of the lien claimant with such person, *held*, not to have been complied with by a statement that material was furnished "to and for the construction of the St. Paul City Railway," at prices agreed upon between the plaintiff and a designated contractor with the St. Paul City Railway Company, the lien claimant being a subcontractor.

APPEAL from Ramsey District Court.

Williams, Goodenow & Stanton, for appellant.

H. J. Horn, for respondent.

DICKINSON, J.—This is an action to enforce a mechanic's

lien. This appeal presents questions as to the sufficiency of the lien statement and of the complaint, under the statute in force prior to the enactment of the lien law of 1889. As respects the property sought to be charged with a lien, the complaint alleges the ownership by the defendant—a domestic corporation—of “certain lines of railway” in the city of St. Paul; that it entered into a contract with the New York Cable Railway Construction Company, a foreign corporation, whereby the latter agreed to construct “a line of railroad in said city for the defendant, and entered upon said work, and constructed a line of railway for said defendant, commonly designated as the ‘cable line road’ of said defendant;” that the construction company purchased from the plaintiff a specified quantity of cement, which was purchased for the construction of the “cable line road aforesaid,” and which was used for that purpose. It is prayed that a lien be adjudged “upon all the line of railway of the defendant.” The lien account filed designates the cement as materials furnished and delivered to the defendant company, “and used in the construction of its line of railway in the city of St. Paul.” The accompanying affidavit declares that it was furnished for the construction of the “St. Paul City Railway, at the city of St. Paul,” and was used for that purpose; that the St. Paul City Railway Company was the “owner of a line of railway operated or to be operated in the city of St. Paul;” that the construction company was the original contractor for its construction; and that the plaintiff claimed a lien upon the said line of railway of the defendant. More briefly stated, it appears from the complaint that, the defendant being the owner of “certain lines of railway” in St. Paul, the construction company constructed for the defendant “a line of railway” commonly designated as “cable line road,” for which the plaintiff sold to the contractor material which went into the construction of that line. The lien statement makes no allusion to that or to any particular line of road, and only refers in general terms to the road for which the material was furnished, and on which a lien is claimed, as being the St. Paul City Railway, or a line of railway in the city of St. Paul owned by the St. Paul City Railway Company. In view of the fact that the defendant had several lines of railway, to which such terms would be equally applicable, such language is not descriptive of the property for the improvement of which the material was furnished or upon which a claim of lien was asserted. The lien statement was therefore insufficient under the statute in force when it was made. The statute required a description or designa-

Case stated.

Description
of property
insufficient.

tion of the premises for the improvement of which labor or material may have been contributed and upon which a lien is sought to be imposed. Gen. St. 1878, chap. 90, § 18; Clark v. Schatz, 24 Minn. 300, 303; North Star Iron Works Co. v. Strong, 33 Minn. 1; Keller v. Houlihan, 32 Minn. 486; Northwestern Cement, etc., Co. v. Norwegian Danish Seminary, 43 Minn. 449.

Read in the light of the facts of the case as stated in the complaint, the lien statement is defective in another particular. Although the section of the statute above cited, setting forth what the lien statement should in substance contain, was not originally framed with a view to its application in the case of subcontractors claiming liens, yet it was held, after the law was so changed as to allow such liens, that this section was still to be followed even in such cases, with such changes as the circumstances might require, this section remaining unchanged, and embracing the only statutory direction as to the form or substance of the required affidavit. Keller v. Houlihan, *supra*. As indicated by that section, the affidavit should state "to and for" whom labor may have been performed or materials furnished by virtue of a contract between the affiant and such person, of which contract, if in writing, a copy should be given. In the case cited it was considered that the affidavit of a subcontractor was defective which did not show that he furnished the material by virtue of a contract with the original or principal contractor. In this case it appears from the complaint that the material for which a lien is claimed was sold by the plaintiff to the contractor, the New York Cable Railway Construction Company, and no contract relation appears to have existed between the plaintiff and the defendant. But in the affidavit it is stated that the material was furnished and delivered "to and for the construction of the St. Paul City Railway," at prices agreed upon between the plaintiff and the construction company, (the contractor.) This does not show to and for whom the material was furnished, with whom the contract was made, except that the price charged was agreed upon between the plaintiff and the construction company. It is not alleged that there was any contract between the plaintiff and the construction company pursuant to which the material was furnished. It is not alleged that the material was furnished for the defendant company, but for the "railway" of the defendant, and, even if the averment be deemed to allege a furnishing to the defendant company, it is not stated that there was any contract therefor between the plaintiff and that company; and besides, as now appears from the complaint, the contract was

**Affidavit in-
sufficient.**

not with that company, but with the contractor, the construction company. The decision last cited is decisive of this point, and the affidavit is held to be fatally defective. In so far as the statute prescribes what the affidavit should contain it should be substantially complied with, especially as against the objections of a party who stands, as does the defendant, in the position of a surety for the contractor. It is sought to make its property answerable for the debt of the construction company. Our conclusion is that the ruling of the court in refusing to receive the lien account in evidence was right. Order affirmed.

Enforcement of Mechanic's Lien by Equitable Proceeding—Amount awarded by Decree—Damages.—Under a bill in equity to enforce a lien for work and labor performed on a railroad under the act of 1879, (chapter 3132, Laws Fla.,) it is error to render a decree for a larger sum than is alleged in the bill to be due, and specially asked for in the prayer for relief. The lien provided by chapter 3132, Laws Fla., is for "labor performed," and independent of the statute such lien would not exist, and a court of chancery would have no jurisdiction to adjudicate it. The existence and extent of the lien here provided must depend upon the provisions of the statute, and it is error to award under it a sum for unliquidated damages arising from breach of contract. *St. John's & H. R. Co. v. Bartola, et al.* (Fla. Aug. 15, 1891), 9 So. Rep. 853.

GORDON HARDWARE CO.

v.

SAN FRANCISCO & SAN RAFAEL R. CO.

(86 California, 620.)

Mechanic's Lien—Time of Filing Claim—Completion of Work.—A mechanic's lien against a railroad will be considered to have been filed within thirty days from the completion of the work, within the meaning of the statute, where it appears that, although the work done within that time was not contemplated by the contract, the obligation of the contractor to the company was not extinguished; and it is proper to count as part of the work two weeks spent by the direction of the chief engineer in removing materials wrongfully placed upon the land of another by the contractor, whose obligations to the company did not terminate until such materials were removed.

Claim of Lien for Articles not Subject to Lien—Segregation.—The claim of a material man of a lien upon a railroad is not vitiated by the fact that his claim is in part for articles not the subject of a lien, where it is shown that his claim is not willfully false, and the court will permit him to make the necessary segregation by throwing out the value of such articles, and declaring for the remainder.

APPEAL from Martin Superior Court.

The action was brought to enforce a lien for materials furnished to original contractors, under a contract to construct a portion of defendant's railroad. Judgment was rendered

for the defendants. The judgment was affirmed in Department One on the 4th of October, 1889, (abstracted 39 Am. & Eng. R. Cas. 576). Upon a first hearing in Bank, the judgment was again affirmed, on the 3d of May, 1890, (abstracted 43 Am. & Eng. R. Cas. 641).

Hepburn Wilkins and H. A. Powell, for appellant.

Lloyd & Wood, E. S. Lippitt, and Chas. F. Hanlon, (O. P. Evans, of counsel,) for respondents.

PER CURIAM.—Upon further consideration of this case we are satisfied that the conclusion we reached on the former hearing—viz., that the claim of lien was not filed within 30 days after the completion of the work—was based upon a misapprehension as to the evidence. The claim was filed June 18, 1884. While it is true the work done after May 17th was work not contemplated by the contract, it nevertheless appears that it was done under the direction of the chief engineer, and that the obligations of the contractor to the company were not extinguished until the debris which he had placed upon Mr. Porter's lot was removed therefrom. The testimony of Mr. Walsh on this subject consists largely of conclusions, but it went in without objection on that ground, and, as against a motion for nonsuit, must be considered as sufficient to establish appellant's contention that the work was not completed until June 2d. He testified as follows: "The work on the railroad under the contract was completed June 2, 1884. The last two weeks of the work was occupied in moving rock which had been dumped at the end of the tunnel in section No. 1, on Mr. Porter's ground, contrary to the terms of the contract. The rock was moved back to the right of way to make it comply with the contract. I was instructed by Mr. Zook, chief engineer, to do this work, May 17, 1884. The last day we were at work was June 2, 1884."

We have carefully examined the record in the case of *Malone v. Big Flat, etc.* Min. Co., 76 Cal. 578, and think it sustains appellant's contention that, although the claim of lien was in part for articles (picks and shovels) not the subject of lien, the court should permit the plaintiff, by proof, to make the necessary segregation, throw out the value of such articles, and declare a lien for the balance. In the case referred to, the claim of lien included an item of deer and bear meat, but the lien was held to be good to the amount of the lienable articles; and the rule seems to be that, unless there is something to show a willful attempt to claim a lien for the non-lienable articles, the lien is not lost. *Whitford v. Newell*, 2 Allen, (Mass.) 427; *Phil. Mech. Liens*, § 355. Upon the same principle it was held in *Barber v. Reynolds*,

Time of filing claim.

Articles not subject to lien.

that, notwithstanding the fact that the claim filed was far too much, it would be still be valid unless it should appear it was a "willfully false claim," within the meaning and intent of the statute. 44 Cal. 533. It was not necessary for the plaintiff to designate what portion of the materials was furnished to each of the contractors, as Hawley was the only person with whom the company had to settle, and the latter was liable only for the balance of the contract price held by it at the time the notice of lien was filed. *Harmon v. San Francisco & S. R. Co.* (Cal.), 25 Pac. Rep. 124, (this day filed.) Judgment and order reversed, and cause remanded for a new trial.

Time of Filing Mechanic's Lien.—See *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, (U. S.) 16 Am. & Eng. R. Cas. 626; note 20 *Id.*, 505.

Lien Upon Railroad Constructed by Individuals.—In *Brown et al. v. Buck et al.* (Arkansas, May 4, 1891), 16 S. W. Rep. 195, it was held that a lien in favor of one who furnishes materials to build a railroad, may exist where the railroad is constructed by individuals who own the road as a copartnership without incorporation, under a statute creating a lien in favor of one who furnishes materials to build "any railroad" upon the roadbed, equipments, and appurtenances of the road. The language of the statute is broad enough to embrace every railroad, whether incorporated or unincorporated.

Mechanic's Lien Statute—Title and Subject of Act.—In *Kansas City & O. R. Co. v. Frey*, (Nebraska, Nov. 19, 1890), 47 N. W. Rep. 87, it was contended that the Nebraska act approved March 3, 1881, making railroads liable for work performed, and materials furnished in the construction or repair of the road was unconstitutional, because the bill contained more than one subject not embraced in the title. The court held, however, that the act was valid, saying: "In *White v. City of Lincoln*, 5 Neb. 505, this court held that where a bill has but one general object, it will be sufficient if the subject is fairly expressed in the title. The question is very fully considered in *People v. Mahaney*, 13 Mich. 494, and it was held in effect that, where the title expressed the general purpose of the bill, it would be sufficient. The object of framers of the constitution was not to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus greatly multiply their number, but it was intended that a proposed measure should stand upon its own merits, and that the several members of the legislature should be apprised of the purpose of the act when called upon to support or oppose it. In other words, members were prohibited from joining two or more bills together in order that the friends of the several bills may combine and pass them. It was never designed to place the legislature in a straitjacket, and prevent it from passing laws having but one object under an appropriate title. The act in this case was designed to secure persons aiding in the construction of a railway either by furnishing labor or material from being defrauded out of their just dues on a contract. It is a well-known fact that prior to the taking effect of the act in question, subcontractors not unfrequently failed to pay their employes, or persons who had furnished materials, and the act in question was designed to remedy that evil. The railway companies, to a great extent, can protect themselves by withholding from the subcontractors the money due until the legitimate claims against such subcontractors for labor and materials have been paid. The judgment of the court below is right, and is affirmed."

FARMERS' LOAN & TRUST CO.

v.

CANDLER *et al.**(Georgia Supreme Court, May 8, 1891.)*

Contractors' Liens—Lien upon Roads as Entirety.—By section 1979 of the Code, contractors to build railroads are entitled to liens upon such railroads, but each lien is upon the whole railroad to which it applies. There is no provision of law allowing a contractor to set up and enforce a lien upon a part of any railroad, though such part may be all of the road which he constructed or aided to construct.

Same—Verdict and Judgment—Lien on Specified Part of Road.—As under section 1990 of the Code, the verdict must set forth the lien allowed, and the judgment and execution must be awarded accordingly, a verdict and judgment which attempt to set up and enforce a lien upon a specified portion of a railroad are void upon their face, so far as the contractor's special lien is concerned.

Same—Sufficiency, of Verdict Describing Lien.—A verdict describing the lien intended to be allowed thereby in these terms: "That the plaintiff have a lien as a contractor to build railroads upon that part of the Gainesville and Dahlonega Railroad from its terminus, in the city of Gainesville, to the Chattahoochee river, in Hall county, including its right of way, roadbed, depot grounds, and all other property belonging to said railroad company, for the sum aforesaid," etc., does not set up a lien upon the whole railroad referred to, but only attempts to do so upon the part extending from Gainesville to the Chattahoochee river.

ERROR from Hall Superior Court.

Contest between the Farmers' Loan & Trust Company and Allen D. Candler and another to establish priority of claims against the Gainesville & Dahlonega Railroad Company. Judgment for Candler. The trust company brings error. Reversed.

Calhoun, King & Spalding, Reid & Stewart, and H. H. Dean, for plaintiff in error.

R. H. Baker, W. P. Price, J. B. Estes, and S. C. Dunlap, for defendants in error.

LUMPKIN, J.—The Gainesville & Dahlonega Railroad, including its right of way, franchises, and all other property, was sold as a whole by a receiver duly appointed.

Case stated. A contest arose over the proceeds of the sale. A. D. Candler claimed the same upon a judgment foreclosing a contractor's lien, and his right thereto was contested by the Farmers' Loan & Trust Company, who claimed under a mortgage or deed of trust securing certain bonds which have been issued by the railroad company. The fund was not sufficient to satisfy the claims of both. This case was submitted to the

decision of the court upon the finding of a jury on certain questions of fact and a statement of facts agreed upon by the parties. The result was a decision in favor of Candler. The controlling questions made by the record are those set forth and adjudicated in the head notes.

1. An examination of section 1979 of the Code will show that it does not contemplate a lien upon a portion of a railroad. The language plainly and unmistakably means that the lien thereby given to a contractor to build railroads must be upon the whole road. If the law were otherwise on this subject, it would be impolitic and impracticable and would often lead to disastrous consequences. To sell a railroad in detached portions would utterly destroy, or greatly diminish, the value of the entire property; and yet this would inevitably result if a contractor could have a lien upon a part only of a railroad, and enforce the same by judgment and sale. We quote the following apt language from *Knapp v. St. Louis, K. C. & N. R. Co.*, 74 Mo. 374, 7 Am. & Eng. R. Cas. 395: "A railroad, with its depots, bridges, and other appurtenances, is no less an entirety than a dwelling house, with its kitchen, its chimneys, and its door steps; and yet no one has ever supposed that a mechanic's lien could be enforced against the doorsteps or chimneys of a dwelling house, or that they could be sold and removed, to the utter destruction of the whole property." The suit brought by Candler for the foreclosure of his lien contemplated a judgment of foreclosure against the whole road, but the verdict and judgment thereon covered only that part of the railroad lying between Gainesville and the Chattahoochee river.

State does not
allow lien on
portion of
road.

2. Section 1990 of the Code, providing for the foreclosure of liens on real property declares that, if the lien is allowed, the verdict shall set it forth, and the judgment and execution be awarded accordingly. It follows from what has already been said that a verdict and judgment attempting to set up and enforce a lien upon a specified portion of a railroad are void upon their face, so far as the special lien is concerned; and therefore the money in court could not legally be awarded to Candler upon his judgment, considered as a special lien.

Verdict and
Judgment.

3. It was contended that the language of the verdict and judgment purporting to establish Candler's special lien extended to and covered the entire railroad and its property. This language is quoted in the third headnote, and we think a fair construction of it leads to the conclusion that it covers only that part of the railroad situated between Gainesville and the Chatta-

Same—Suffi-
ciency of ver-
dict.

hoochee river, and the property immediately therewith connected. The words, "including its right of way, roadbed, depot grounds, and all other property belonging to said railroad," must be construed with the words preceding them, viz., "that part of the Gainesville and Dahlonga Railroad," etc.; and the obvious meaning is that the items of property following the word "including" are those only which are situated within the limits designated.

The court below did not consider or determine whether or not Candler's judgment, considered merely as a general lien on the railroad's property, was superior to the mortgage, but adjudged that his special lien as a contractor to build railroads was lawfully foreclosed, and that his judgment was valid, as such, against the property, and entitled to take the money. This ruling, we think, was error, and the judgment of the court below is therefore reversed. Judgment reversed.

Mechanic's Lien Enforceable Against Railroad as Entirety.—See *ante*, *Farmers' Loan & T. Co. v. Canada & St. Louis R. Co.* and note, p. 271.

CHICAGO, SANTA FE & CALIFORNIA R. CO.

v.

PRICE.

(138 *United States*, 185.)

Construction Contract—Conclusiveness of Engineer's Estimates.—Where a contract with a railroad company for construction work provided for monthly payments to the contractor, "on the certificate of the engineer," and that the determination of the chief engineer should be conclusive on the parties as to quantities and amounts, and where, in executing the contract each monthly contract as made up by the division engineer was sent to the chief engineer, and the monthly payments were made on the certificate of the latter officer, his action in making such a certificate was held to be a "determination" under the contract conclusive upon the parties in an action at law, in the absence of fraud, or of such gross error as to imply bad faith.

In error to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought by Price, McGavock & Co., for the use of Jones, Forrest & Bodkin, to recover from the Chicago, Santa Fe & California Railroad Company the balance alleged to be due them under a written contract, made March 21, 1887, for the clearing, grubbing, and masonry necessary to complete the roadbed of that company from a point on the Mississippi river to Galesburg, Ill., a distance of about 50

miles. The parties in writing, waived a jury, and tried the case before the court, which made a special finding of facts. There was a judgment against the railroad company. 38 Fed. Rep. 304.

The contract contained, among other provisions, the following:

"The aforesaid party of the first first, [Price, McGavock & Co.,] in consideration of the prices hereinafter agreed to be paid to them by the party of the second part, [the railroad company,] hereby agree and bind themselves to construct and in every respect to complete the grubbing and clearing, grading and masonry, including the furnishing of materials and all other things requisite and necessary to complete the roadbed and prepare the same ready for receiving the superstructure, upon that portion of the railroad of the party of the second part known and designated as 'section ———, number ———, the first fifty (50) miles eastward from station thirty, (30), east bank of Mississippi river, of the Chicago, Santa Fe & California Railway,' in such a manner as will conform in every respect to the annexed specifications and to the following conditions, viz.:

"(1) That the work shall be commenced within ten (10) days after the execution of these presents, or as soon after as the railway company shall have acquired a title to the lands, and shall be completed on or before the 1st day of August, one thousand eight hundred and eighty-seven.

"(2) The work shall be executed under the direction and supervision of the chief engineer of said railway company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of works performed under this contract shall be determined, and whose determination shall be conclusive upon the parties, and who shall have full power to reject or condemn all work or materials which in his or their opinion do not fully conform to the spirit of this agreement; and said chief engineer shall decide every question which can or may arise between the parties relative to the execution thereof, and his decision be binding and final upon both parties; and whereas the classification of excavation provided for in the annexed specifications is of a character that makes it necessary that special attention should be called to it, it is expressly agreed by the parties to this contract that the determination, by the measurements and calculations of the said engineer, of the respective quantities of such excavation, shall be final and conclusive.

* * * *

"(5) If any damage shall be done by the party of the first part (or persons in their employ) to the owners or occupants

of lands or other property adjoining or in the vicinity of the work herein contracted to be done, the engineer of said company shall have the right to estimate the amount of said damage, and to pay the same to said owner or occupant, and the amount so paid for such damage shall be deducted from the value of work done under this contract.

* * * *

"The aforesaid party of the second part hereby agrees that whenever this contract shall be completely performed on the part of the said party of the first part, and the engineer has certified the same in writing, the said party of the second part shall, within ten days thereafter, pay to said party of the first part any remaining sums due for said work, according to this contract, as follows, to-wit: [Here follow the prices agreed upon for different kinds of work to be done.]

* * * *

"It is further agreed between the parties that monthly payments shall be made by the party of the second part, on the certificate of the engineer, for work done, deducting ten per cent. from the value of work done, as agreed compensation for damages, to be forever retained by the party of the second part in case the whole amount of work herein named shall not be done in accordance with this agreement.

"For the purpose of avoiding all causes of difference or dispute between the parties to this contract relative to its true intent or meaning, and for the purpose of adjusting in an amicable manner any difference that may or can arise relative thereto, it is hereby mutually understood and agreed by the parties as follows, to-wit:

"(1) No extra charges will be claimed or allowed on account of changes, either in the line or grade of the road, the prices herein mentioned being considered as full compensation for the various kinds of work herein agreed to be performed.

"(2) Whenever work is required to be done which is not now contemplated or covered by the prices herein mentioned, the engineer shall fix such prices for the work as he shall consider just and equitable, and the said parties shall abide by such prices, provided the party of the first part enter upon and commence such work with full knowledge of the prices so fixed by the engineer; but if the party of the first part decline executing said work at the price fixed by the engineer, then the party of the second part may enter into contract with any person or persons for its execution, the same as if this contract had never existed; and if extra work, or work not provided for in this contract, is performed by the con

tractors, without protest or notice in writing to the engineer and to the party of the second part before prices shall have been fixed to such work, then the engineer shall estimate the same at such prices as he shall deem just and reasonable, and his decision shall be final, and the party of the first part shall accept of said prices in full satisfaction of all demands against the party of the second part for said extra work; but nothing shall be deemed extra work that can be measured or estimated under the provisions of this contract.

* * * *

"(5) It is expressly agreed by the party of the first part that the party of the second part may at any time pay so much of the money due the party of the first part on the running or final estimates above mentioned to the laborers employed by the party of the first part as may be due said laborers, and charge the same to the party of the first part.

"(6) In case any or all work embraced in this contract shall be permanently suspended by and on account of the party of the second part, which it is hereby agreed the party of the second part may do, for other causes than heretofore provided in this contract, then, in that case, all further operations under this contract shall be suspended within three days after receiving written notice from the party of the second part requiring the further progress of the work to be suspended, and the party of the first part shall have their choice either to consider such suspension temporary and resume work on the same within ten days after receiving notice to resume work, or may consider the same at an end, and shall receive full pay for all work by them performed under this contract, and at the prices herein stipulated, upon the estimate of the engineer, which shall be final and conclusive between the parties to this contract; which estimates shall not include any anticipated profits that might have accrued from the completion of the said work, it being understood that no claim for damages shall be made by the party of the first part on account of any profits that might accrue from the completion of the same."

Norman Williams, for plaintiff in error.

P. S. Grosscup, for defendants in error.

HARLAN, J.—The written contract between the parties in this case does not materially differ from the one before this court in *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 553. In that case the contractor did not allege in his declaration that the engineer ever certified in writing the complete performance of the contract, together with an estimate of the work done and the amount of compensation due him according to

Conclusive-
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the prices established by the parties, which certificate and estimate was made by the agreement a condition of the liability of the company to pay the contractor the balance, if any, due him. Nor did the declaration allege any facts which, in the absence of such a certificate by the engineer, whose determination was made final and conclusive, entitled the contractor to sue the company on the contract. It was held, in accordance with the principles announced in *Kihlberg v. U. S.*, 97 U. S. 398, and *Sweeney v. U. S.*, 109 U. S. 618, that the declaration was fatally defective in that it contained "no averment that the engineer had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him." Some observations in that case are pertinent in the present one. It was said: "We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract; and it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to rely upon their right, which the law presumes they did not intend to waive, to demand that the engineer should at all times, and in respect to every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith."

The only difference between that case and the present one is that the alleged mistakes of the engineer in the former were favorable to the railroad company, while in this case they are favorable to the contractors. But that difference cannot affect the interpretation of the contract. In the present case the agreement was that the work should be executed under the direction and supervision of the chief engineer of the railroad company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work should be determined, and "whose determination shall be conclusive upon the parties." Any decision of the chief engineer relating to the execution of the contract was to be "binding and final upon both parties." His measure-

ments and calculations as to excavations were made "final and conclusive."

What are the substantial facts found by the court below? The work was in four divisions, each division being in charge of an assistant or division engineer, who acted under the general direction of the chief engineer. The agreement provided for monthly payments to the contractor, on the certificate of the engineer, "for work done;" 10 per cent. from the value thereof to be retained by the company until the whole work was completed in accordance with the contract. The work was under the immediate supervision of the division engineer. On the first day of each month he made up and forwarded to the assistant chief engineer an estimate of work done on each section of his division, according to quantities and classifications. Upon such estimates the assistant chief engineer ascertained the amount due the contractor to the beginning of the month. These monthly estimates were approved by both the assistant chief engineer and chief engineer. This course was pursued until the work was substantially completed, and was accepted and taken possession of by the company. Subsequently, without the knowledge or co-operation of the contractors, Baker, a subordinate engineer of the railroad company, who had not supervised the work of the plaintiffs, re-estimated and reclassified it, and upon such re-estimate and reclassification, which were approved by the chief engineer, the company claimed that the monthly estimates upon which the plaintiffs had been paid from time to time were much too large.

Facts of the case.

We are of opinion that the ultimate facts, as found by the court, do not authorize the railroad company to go behind the estimates made from time to time by its division engineer, which were approved and certified by the assistant chief engineer and chief engineer. Within a reasonable interpretation of the contract, the last monthly estimate of work done on division 9, (that being the only division here in dispute,) followed by the acceptance by the company of the whole work, was a certificate of complete performance, entitling the plaintiff to be paid in full according to the terms of the contract. While there was evidence tending to show that the estimates by the division engineer, upon which the last monthly certificate was based, were not made up from actual measurements on the ground, but from reports by subcontractors, there was also evidence tending to show that the remeasurements and reclassifications which the company caused to be made after the completion and acceptance of the work, and which it calls the "final estimate," were inaccurate. But there is no fact

Company cannot go behind estimates.

distinctly found indicating fraud upon the part of the company's engineers, or such gross mistakes by them as imply bad faith. It is found only that the monthly estimates might, with reasonable care, have been made nearly accurate, and that, if the remeasurements and reclassifications were correct, the discrepancy between them, and the monthly estimates, upon which the plaintiffs were paid from time to time, could be explained only upon the ground of negligence, incompetency, or dishonesty upon the part of the division engineer. But the court did not find that the monthly estimates were inaccurate, or that the chief or division engineer was dishonest, or that the subsequent remeasurement and reclassification were correct. The mere incompetency or mere negligence of the division or chief engineer does not meet the requirements of the case, unless their mistakes were so gross as to imply bad faith.

We are of opinion that the judgment is supported by the finding of facts, and it is affirmed.

Railroad Construction Contracts—Finality and Effect of Engineer's Estimates.—See *Kelly v. McCauley*, (Pa.) 40 Am. & Eng. R. Cas. 509; *Louisville, E. & St. L. R. Co. v. Donnegan*, (Ind.) 34 *Id.* 116; *Kistler v. Indianapolis, etc. R. Co.*, (Ind.) 12 *Id.* 314; *Galveston, etc. R. Co. v. Henry*, (Tex.) 25 *Id.* 265; note 24 *Id.* 352.

GRAFFIN

v.

CHARLESTON, CINCINNATI, & CHICAGO R. CO.

(*South Carolina Supreme Court, July 21, 1891.*)

Contract to Furnish Cross Ties—Defective Ties—Burden of Proof.—Where a party contracts with a railroad company to furnish ties, and the contract provides that the ties are to be inspected by an officer of the company, those which come up to the specifications in such contract to be accepted, and those which do not, to be rejected, and the company accepts certain ties which it refuses to pay the stipulated price for on the ground that they are defective, the jury, in an action to recover the contract price of such ties, have a right to assume, in the absence of evidence to the contrary, that all the ties accepted and used came up to the contract. Accordingly, it is proper to instruct the jury that the burden of proof is on the railroad company to show that the ties used by it without inspection were defective.

Same—Admissions—Estoppel—Instructions to Jury.—In such action the court charged the jury that the company had set up admissions of the plaintiff that a very large amount of ties had been paid for, which was a question for the jury to determine. The jury were then instructed that such admissions must be received and weighed with great care, and would not estop the plaintiff "unless defendant had done something or in some way acted upon them." *Held*, that the charge was not erroneous as invading the province of the jury, nor as inapplicable to the case.

APPEAL from Lancaster Common Pleas Circuit Court.
J. F. Hart and *R. E. & R. B. Allison*, for appellant.
Jones & Williams, for respondent.

MCIVER, J.—This was an action to recover a balance alleged to be due plaintiff under a written contract with the defendant company for the delivery of a large number of railroad cross ties, according to certain specifications contained in the contract. The plaintiff having recovered a verdict for \$600, the defendant moved for a new trial on the minutes, which being refused, judgment was entered on the verdict, from which defendant appeals upon the several grounds set out in the record. Case stated.

The third, fourth, sixth, and seventh grounds raise questions of fact only, and this being an action at law, pure and simple, it is very obvious that we have no jurisdiction, to consider such questions. The first ground imputes error to the circuit judge in charging the jury "that, if the defendant, the railroad company, took up and used the cross ties of plaintiff, whether they had been accepted or rejected by the inspector of the company, under the contract between the parties, the *onus* rested on the defendant to show that said cross ties were defective." We do not see any error in this. The contract provided that the cross ties to be delivered by plaintiff were to be inspected by an officer or agent of the company, and those which came up to the specifications were to be accepted and paid for at the stipulated price, while those which did not come up to the specifications were to be rejected. Hence the natural inference would be, and the jury would have the perfect right to assume, in the absence of any evidence to the contrary, that all the cross ties accepted and used by the company came up to the contract, and were to be paid for accordingly. But this natural, and we may say necessary, inference was susceptible of being rebutted by testimony showing that, although the cross ties were received, yet in fact some of them did not come up to contract; and this was what the jury were told, in effect, when they were instructed that the *onus* of proof would be upon the defendant to show that, although the cross ties were received and used by the company, yet in fact some of them were defective. Acceptance of ties—Burden of proof.

The second ground of appeal does not correctly represent the charge of the circuit judge, and for this reason, if there were no other, cannot be sustained; for the jury were not charged that the defendant would be chargeable as for good ties at the rate stipulated for in the contract, if the defendant used the cross ties of plaintiff, Admissions—Estoppel.

whether they had been inspected and received or rejected by the inspector, but the charge was that the company would be presumably chargeable, in such case, for good cross ties. This was but saying, in a different form, the same thing which is made the subject of the first ground of appeal already considered.

The fifth ground complains that the circuit judge "invaded the province of the jury in charging that they must receive and weigh the admissions of the plaintiff with great care, and that, unless the defendant was misled by them, the plaintiff is not now bound by them." The circuit judge did not use the language here attributed to him, but what he did say was "that you must receive and weigh these admissions of the plaintiff with great care; unless the defendant had done something, or had in some way acted upon them, they cannot have effect as estoppels against his claim now." This remark was immediately after the judge had stated that the defendant had set up as a defense the admission of the plaintiff that a very large amount of the cross ties had been paid for, which the jury were told was a question of fact for them to determine, and then followed the charge excepted to as to the law of estoppel; which, as we learn from the argument, was not objected to as presenting an incorrect proposition as to the law of estoppel, but as inapplicable to the case. And the case of *Thomson v. Sexton*, 15 S. Car. 95, where this court said: "Error may be committed, not only by laying down to the jury incorrect general principles of law, but also by applying correct principles of law to cases in which they are not properly applicable." The defendant manifestly relied, as a part, at least, of its defense, upon certain admissions alleged to have been made by the plaintiff, and it is very obvious that such a defense might raise both questions of fact and law. The questions of fact would be whether such admissions were in fact made, and, if so, whether they were true, or made under a mistake, and these would be questions for the jury. The question of law, however, would be whether such admissions, whether true or false, or made under a mistake, would amount to an estoppel. It seems to us that the practical effect of the judge's charge was to leave the questions of fact to the jury without any intimation whatever as to his own opinion, and then to lay down the law of estoppel, in which we see no error. The judgment of this court is that the judgment of the circuit court be affirmed.

MCGOWAN, J., concurs.

Contract to Furnish Railroad Ties—Inspection—Acceptance of Check and Receipt of Bill.—The case of *Robinson v. Detroit, L. & N. R. Co.*, 84 Mich. 658, involved the question of the effect of the acceptance by the plaintiff

of a check for the amount claimed by defendant to be due him for ties furnished the defendant as per a statement accompanying the check, and which plaintiff receipted, but on the same day sent defendant a protest against the inspection upon which the account was based. And it was held that the whole question as to whether it was a conclusive and binding settlement was properly left to the jury, and the judgment in favor of the defendant was affirmed.

Contract to Fill a Trestle—Space Occupied by Culvert.—In *East Tenn., Va. & Ga. R. Co. v. Matthews*, 85 Ga. 457, it was held that a contractor who enters into a written contract with a railroad company to fill in a trestle on the track, cannot recover for the space occupied by a brick culvert constructed by the company under the trestle, where the contract provides for compensation by the cubic yard of dirt.

Contract for Construction of Railroad by Stockholder Owning Nearly all the Stock.—In *Donoghue v. Indiana & L. M. R. Co.* (Michigan, July 18, 1891), 49 N. W. Rep. 512, it was held that where the owner of nearly all the stock and franchises of a railroad company in his individual capacity for the construction of a part of the road, not purporting to sign the contract as agent nor in any other capacity than that of an individual, and there is no evidence of any original authority from the company, express or implied nor a subsequent ratification, the company is not bound thereby.

ATLANTA & FLORIDA R. CO.

v.

KIMBERLY.

(*Georgia Supreme Court, April 24, 1891.*)

Independent Contractor—Creation of Nuisance—Liability of Railroad Company.—A railroad may be properly built without the creation of a nuisance. Accordingly, a railroad company retaining no control over the manner of constructing its road, is not liable for the damages resulting from a nuisance created by an independent contractor in constructing the road, consisting of a pond and the accumulation of filth upon plaintiff's land. The fact that the company's superintendent directed the placing of a soil pipe at a certain point for drainage purposes, and the contractor placed a pipe of insufficient capacity in the wrong place according to his own judgment, does not render the company liable, although it may have had notice from the plaintiff that in his opinion the pipe was too small.

Same—Ratification of Contractor's Acts.—A railroad company cannot be considered to have ratified the acts of an independent contractor in constructing its road whereby he creates a nuisance upon adjoining land, where it appears that possession of the road was not, at the time of the injuries complained of, delivered to the company.

Cause of Sickness Produced by Nuisance—Evidence—Striking Out Part of Answer.—In an action against a railroad company for the creation of a nuisance upon the plaintiff's land, the plaintiff testified at the trial that the malaria of which he complained resulted from four causes, viz.: An embankment, a dam, a horse lot, and a hog lot. Plaintiff's petition contained no allegation as to the horse lot and the hog lot. The evidence as to these causes was stricken from his testimony. *Held*, that it was error to admit the answer as changed since it made the injury dependent upon two causes while the plaintiff assigned four.

ERROR from Clayton Superior Court.

J. Carroll Payne and *N. J. & T. A. Hammond*, for plaintiff in error.

J. C. Reed and *Dorsey, Brewster & Howell*, for defendant in error.

SIMMONS, J.—Kimberly sued the railroad company for damages, and alleged in his declaration “that while the company was constructing its road it made a deep cut, and piled the fresh earth therefrom near his dwelling house, and damned up a small stream, and ponded the water therefrom near the house; and that it also stationed near the house a camp of convicts, whom it was using in said construction, and permitted the filth accumulating in the sinks of this camp and otherwise therein from the convicts to flow from the camp, and be deposited a few yards from the house, by reason of which the air in and around the house became infected with noxious scents, malaria, and other substances injurious to health, whereby plaintiff and his wife both became sick, and endured great pain and suffering, and were unable to attend to their daily duties,” etc. The defense of the railroad company was that it did not do the acts complained of in the declaration; that, if they were done at all, they were done by the Chattahoochee Brick Company, an independent contractor, which it had employed to build the railroad from Atlanta to Senoia. On the trial of the case the jury found a verdict for the plaintiff, and the defendant made a motion for a new trial on the various grounds set out therein, which was overruled, and it excepted.

The main question argued before us was whether under the facts of this case the railroad company was liable for the damages sustained by Kimberly. The general rule of law upon this subject is: Where an individual or corporation contracts with another individual or corporation exercising an independent employment for the latter to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor’s own methods, and not subject to the employer’s control or orders except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or of the contractor’s servants. Code, § 2962; *Harrison v. Kiser*, 79 Ga. 588. And see the following text-books and cases therein cited: 1 Lawson, Rights, Rem. & Pr. § 295; 2 Thomp. Neg. 899 *et seq.*; *Id.* 909–913; 2 Wood, Ry. Law, § 284. Also, 1 Add. Torts, 302; Cooley, Torts, 644; Bish. Non-Cont. Law, § 606; Pierce, R. R. 286–291; 1 Rorer, R. R. 468–470; Whit. Smith,

Liability for
torts of in-
dependent
contractor.

Neg. 171 *et seq.*; Wood, Nuis. 77, p. 81: Dicey, Parties, (2d Amer. Ed.) 468 *et seq.* See especially the following cases: Peachy *v.* Rowland, 22 Law J. C. P. 81, 13 C. B. 182; Cuff *v.* Newark & N. Y. R. Co., 35 N. J. Law, 17; Clark *v.* Railroad, 39 Mo. 202; McCafferty *v.* Spuyten Duyvil & P. M. R. Co., 61 N. Y. 178; Hughes *v.* Cincinnati & S. R. Co., 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100; Hilliard *v.* Richardson, 3 Gray, (Mass.) 349; Eaton *v.* European & N. A. R. Co., 59 Me. 520; Wabash, St. L. & P. R. Co. *v.* Farver, 111 Ind. 195, 31 Am. & Eng. R. Cas. 134; Kansas Cent. R. Co., *v.* Fitzsimmons, 18 Kan. 34; Painter *v.* Pittsburgh, 46 Pa. St. 220.

To the general rule there are several exceptions: (1) Where the work is wrongful in itself, or if done in the ordinary manner, would result in a nuisance, the employer will be liable for injury resulting to third persons, although the work is done by an independent contractor. This is upon the principle that if one contracts with another to commit a

Same—Exceptions from rule of non-liability.

nuisance, he is a co-trespasser by reason of his directing or participating in the work; in other words, the rule is that, "If the act or neglect which produces the injury is purely collateral to the work contracted to be done, and entirely the result of the wrongful acts of the contractor and his workman, the proprietor is not liable; but if the injury directly results from the work which the contractor engaged and was authorized to do, he is equally liable with the contractor."

2 Thomp. Neg. 903. See, also, authorities cited *supra*. (2) If, according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed, the employer will be liable, and not the contractor, because, it is said, it is incumbent on him to foresee such danger, and take precautions against it; and this is the principle upon which the cases of Bower *v.* Pante, 1 Q. B. Div. 321; Tarry *v.* Ashton, *Id.* 314; and Pickard *v.* Smith, 10 C. B. (N. S.) 470,—relied on by the defendant in error, were decided. And in this exception is included the principle that where the injury is caused by defective construction which was inherent in the original plan of the employer, the latter is liable. See authorities cited *supra*. Also Robbins *v.* Chicago, 4 Wall. (U. S.), 657; Boswell *v.* Laird, 8 Cal. 469; Lancaster *v.* Connecticut Mut. L. Ins. Co., 92 Mo. 460. For instance, if any person employs another to erect a building, and the plan of the building is defective, the walls being too thin and weak, and the building while in process of erection falls, and causes injury to a third person, the employer, and not the contractor, is liable. Or, if a contractor is employed to build a sewer, and the employer agrees to furnish the materials,

and the sewer pipe furnished by the employer is too small, and damage is sustained by reason thereof, the employer is liable. (3) The next exception is where the wrongful act is the violation of a duty imposed by express contract upon the employer; for where a person contracts to do a certain thing he cannot evade liability by employing another to do that which he has agreed to perform. For instance, where a company undertook to lay water pipes in a city, agreeing with the city that it would "protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which might occur by reason of the neglect of their employes in the premises," and the company let out the work to a contractor, who used a steam drill in such a manner as to frighten a traveler's horse and injure the traveler, it was held by the supreme court of the United States that the company was liable. *St. Paul Water Co. v. Ware*, 16 Wall. (U. S.) 566. (4) The next exception is where a duty is imposed by statute. The person upon whom a statutory obligation is imposed is liable for any injury that arises to others from its non-performance or in consequence of its having been negligently performed, either by himself or by a contractor, employed by him. Thus, where the statute imposed upon a railroad company, as a duty to the proprietors of inclosures through which the road passed, the obligation of placing stock-guards, and preserving or supplying fences, on the right of way, and protecting the inclosure from injury, in the construction of its road, the company was held liable for the failure to perform such duty, though resulting from the negligence of a contractor. *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77. And it was upon this principle that the cases of *Wilson v. White*, 71 Ga. 506; *Gray v. Pullen*, 5 Best & S. 970; *Hole v. Sittingbourne & S. R. Co.*, 6 Hurl. & N. 488; and *Chicago, St. P. & F. R. Co. v. McCarthy*, 20 Ill. 388,—relied upon by counsel for the defendant in error, were decided. And the case of *Hinde v. Wabash Navigation Co.*, 15 Ill. 72, also relied upon for the defendant in error, falls under the same principle. In that case the charter imposed upon the company the duty of paying for all material taken for the use of its work, and expressly gave a remedy against the company; and it was held that the company could not by delegating its work to a contractor escape liability for material taken by him for the work; especially as he was working under the immediate supervision and direction of the engineer of the company. (5) The employer may also make himself liable "by retaining the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming control of

the work, or some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference. But merely taking steps to see that the contractor carries out his agreement, as having the work supervised by an architect or superintendent, does not make the employer liable; nor does reserving the right to dismiss incompetent workmen." 1 Lawson, Rights, Rem. & Pr. 299; *Harrison v. Kiser, supra*. (6) The employer may also be held liable upon the ground that he has ratified or adopted the unauthorized wrong of the independent contractor. See *Harrison v. Kiser, supra*; 2 Thomp. Neg. 903, 915.

Applying the foregoing principles to the facts of this case, we find that the railroad company made a contract with the Chattahoochee Brick Company, whereby the latter agreed to build the former's road from Atlanta to Senoia, according to certain specifications; and the railroad company did not retain any control over the contractor as to the method or manner of doing the work. The construction company was to furnish the labor and all the materials, including the pipes with which the sewers or culverts were to be built. All the control reserved by the road was that its superintendent was to see that the road was built according to the contract. There is no indication in the record outside of some loose and illegal declarations of third parties, the admission of which as evidence we will speak of presently, tending to show that the railroad company had any authority, power, or control over the construction, as to the manner or means of doing the work. This being true, the railroad company, under the general rule above announced, is not liable for the negligent acts done by the contractor. It was argued by the able counsel for the defendant in error that the building of a railroad necessarily results in a nuisance, unless certain precautions are taken to prevent it; that the low places by which the surrounding lands are drained and from which the water is carried off must be filled up, and, unless certain precautions are taken to provide an escape for the water, a nuisance necessarily results; and that the railroad company cannot escape liability by having the work done by an independent contractor. If the premises of counsel are true, the conclusion might also be true; but if a railroad is built properly, we do not think any nuisance will result from the building. The company, under its charter, had authority of law to do this work; and when it contracted with the construction company it was of course implied that the latter would do the work in a proper and lawful manner. "A person employing another to do a lawful act is presumed, in the absence of evidence to the con-

Company not
liable in this
case.

trary, to have employed him to do it in a lawful and reasonable manner; and therefore, unless the parties stand in the relation of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the work is done." 1 Redf. R. R. (6th Ed.) 542. Moreover, the evidence shows that in the very place where this nuisance is said to have occurred the railroad company had provided means which, if used, would have prevented the nuisance. The superintendent directed that a wasteway should be placed there, but the contractor put in a pipe, which the defendant claims was one of the causes of the nuisance, (1) by being too small to carry off the water in proper time, and (2) because it was not put upon the bed of the stream, but several inches above the bed, thereby causing the water to pond near the plaintiff's house. Nor would the other things which it is claimed caused the nuisance, to-wit, the throwing up of the fresh dirt, the convict camp, and the hog and horse lots, render the railroad company liable. It had lawful authority for excavating the hills and filling the bottoms in order to make its roadbed; and the placing of the convict camp and the hog and horse lots near the plaintiff's house was the act of the construction company, over which, it appears from the record, the railroad company had no power or control. So it will be seen that the work committed to the construction company was not wrongful *per se*, nor did it necessarily result in a nuisance; and therefore does not fall within the first exception to the general rule.

Nor is there any legal evidence to show that it would fall within the second exception. It is claimed that the pond of water was caused by the sewer pipes being too small to carry it off, but there is no evidence that the railroad company directed that this particular size of pipe should be placed at that point. It is true there are some declarations of Hammond & English to the effect that the superintendent ordered it to be put there, but these declarations were illegal, and should have been excluded. If it should be shown upon the next trial that this particular size of pipe was placed at that point by direction of the company, or if the specifications in the contract required it to be placed there, and it should be further shown that this part of the plan was inferentially defective, and that it caused this nuisance, and the plaintiff sustained injury thereby, the railroad company would be liable. But if the railroad company did not direct this particular size of pipe to be placed at that point, or its plans and specifications did not require it, and it was put there by the contractor according to his own judgment, and negligently placed above the bed of the stream, then the railroad com-

pany would not be liable, although it may have had notice from the plaintiff that in his opinion the pipe was too small. If the railroad company had no control over the contractor as to the manner in which he should build the sewer or put in the pipe, any notice which the plaintiff might give its officers would not make it liable. The contractor being in an independent employment, whatever he does outside of or beyond his contract is a collateral act for which the employer is not liable. He is not the servant or agent of the employer, and the employer cannot be held liable for any acts of negligence committed or omitted by him outside of his contract. Where the work he is engaged to do is lawful, the law presumes that he will do it in a lawful manner; and if he does it illegally he is liable and not the employer.

Nor do the facts of the case bring it within the third or the fourth exceptions. There was no duty imposed upon the railroad company, either by contract or by statute, to do this particular work, or to do it in a particular way. Its charter does not impose upon it the duty of building the road, and does not specify the manner in which it shall be built; nor is any liability imposed upon it for acts of the kind complained of in this case. The authorities all hold that a railroad company has the right to make a contract with other parties for the construction of its road, and it is held that a contract of this character is not such a delegation of its chartered rights as to render the company liable for unauthorized wrongs committed by the contractor or his servants while engaged in the work. "The principle that a railroad company cannot delegate to an employe its chartered rights and privileges, so as to exempt it from liability, does not extend to the use of the ordinary ways and means for the construction of the road, but to the use of such extraordinary powers only as the company itself could not exercise without having first complied with the conditions of the legislative grant of authority. Thus, after having first procured the right of way, the company can delegate to another lawful authority to enter upon the same and make its road-bed and perform other proper acts of construction; but it cannot delegate such lawful authority without having first secured the right of way by donation, purchase, or the exercise of the right of eminent domain." *Cunningham v. International R. Co.*, 51 Tex. 513. See *Pierce*, R. R. 290.

As we have already seen, the case does not come within the fifth exception, for there is no legal evidence that the railroad company had any control over the construction, as to the manner or means of doing the work. Nor does it come within the next excep-

No ratifica-
tion shown.

tion, for the facts do not show any ratification of the wrongful acts of the contractor. It is not shown when the company accepted the road from the contractor. The evidence does show that the work near the plaintiff's house was done either in March, April or May, and that about the 1st of June the plaintiff and his wife became sick. But under the contract the road was not to be turned over to the company until several months after this. The company not being in possession of the road at the time the plaintiff received the injury from the nuisance, and there being no evidence to show that it knew there was a nuisance, it cannot be said that the company ratified any act of its contractor which created a nuisance.

It only remains for us to say that we think the court should have excluded the whole answer to the interrogatory set out in the fourth ground of the motion for a new trial, and that the error was not cured by the agreement of the defendant's counsel that the whole might be read, after the court had decided that only a part of it could be read. In his answer the witness assigned four causes, which, in his opinion, produced the malaria: The embankment of loose earth, the horse lot, and the hog lot, and the dam. This answer was objected to because there was no allegation in the petition that the horse lot and hog lot produced the malaria. The court therefore ruled that these two reasons should be stricken, and the remainder of the answer read. The effect of this ruling was to make the witness testify that the loose earth and the dam alone produced the malaria, when the answer showed that in his opinion it was produced by these and the horse and hog lots. We do not think the answer of the witness ought to have been cut up in this manner. By so doing he was made to testify what he did not intend to. The plaintiff should either have amended his declaration to meet the proof, or the whole answer should have been excluded. Nor do we think the defendant waived this error by consenting, after the above ruling, that the whole should be read. The ruling of the court striking out two of the causes of malaria and leaving in two placed the defendant in a worse position than that in which it would have been if the whole answer had remained. The court should also have excluded the declarations of English & Hammond as set out in the fifth and sixth grounds of the motion. They were not the servants or agents of the railroad company, and any declarations they may have made would not bind the company.

Judgment reversed.

Liabilities of Railroad Companies for Torts of Independent Contractors.

—See *Rogers v. Florence R. Co.* (S. Car.), 39 Am. & Eng. R. Cas. 348, note 354; *Rome & D. R. Co. v. Chasteen* (Ala.), 40 *Id.* 559; note 44 *Id.* 653; *Miller v. Minnesota & N. R. Co.* (Iowa), 38 *Id.* 234; *Burton v. Galveston H. & S. A. R. Co.* (Tex.), 21 *Id.* 218; *Hughes v. Cincinnati & S. R. Co.* (Ohio), 15 *Id.* 100, note 110; *Edmundson v. Pittsburgh, etc., R. Co.* (Pa.), 23 *Id.* 423; *Philadelphia, etc., R. Co. v. Hahn* (Pa.), 32 *Id.* 24; *Murtfieldt v. New York, etc., R. Co.* (N. Y.), 25 *Id.* 144; *Wabash, etc., R. Co. v. Farver* (Ind.), 31 *Id.* 134; *Speed v. Atlantic, etc. R. Co.* (Mo.), 2 *Id.* 77; *New Orleans, etc., R. Co. v. Reese* (Miss.), 18 *Id.* 110.

Same—Construction of Road—Connection of Company with Injury Caused by Excavations.—In *Alabama Midland R. Co. v. Coskry*, (Ala., April 9, 1891), 9 So. Rep. 202, it was held that courts will take judicial notice that railroad lines are marked out and grades fixed by the company's engineer; and it cannot be contended in an action against the company for damages to property by excavations in the construction of its road, that defendant is not connected with the damages, since for aught that appears, the grading contractor might have avoided the injury by making shallower cuts.

MACON & ATLANTIC R. CO.

v.

MACON & DUBLIN R. CO.*(Georgia Supreme Court, October 27, 1890.)*

Construction of Railroad Within Certain Distance of Constructed Line—Georgia Statute.—A statute providing that "where a railroad or branch railroad is intended to be built under this section between two points where a railroad is now constructed, the general direction and location of such new railroad shall be at least ten miles from the railroad already constructed" etc., does not prevent the building of a railroad within less than ten miles of a railroad in process of construction, but not completed.

ERROR from *Twiggs Superior Court*.

Gustin, Guerry & Hall and *C. Anderson*, for plaintiff in error.

W. M. Wimberly, Bacon & Rutherford, *J. M. Stubbs*, *J. D. Jones*, and *L. D. Shannon*, for defendant in error.

BLANDFORD, J.—At the instance of the defendant in error the plaintiff in error was enjoined by the judge of the superior court from making or constructing its railroad within 10 miles of the roadbed of the *Case stated.* **Macon & Dublin Railroad Company.** It appears from the record in this case that the **Macon & Dublin Railroad Company** received its charter on the 8th day of August, 1885, under the general railroad law of this state, as embraced in section 1689 *et seq.* of the Code; that the **Macon & Atlantic Railway Company** obtained its charter likewise in April, 1890; that at the time of the filing of the petition praying for injunction, the **Macon & Dublin Railroad Company** had not constructed its

roadbed from Macon to Dublin by some 13 miles. So the whole question in this case turns upon the construction of section 1689 of the Code, which is as follows: "Where a railroad or branch railroad is intended to be built under this section, between two points where a railroad is now constructed, the general direction and location of such new railroad shall be at least ten miles from the railroad already constructed, but this section shall not be construed to refer to any point within ten miles of either terminus, or to prevent said roads from running as near to each other for said first ten miles from either terminus as the interest of such company building the new route may dictate." It will be perceived that

Statute not applicable to road in process of construction.

this section provides that, where a railroad or branch railroad is intended to be built between two points where a railroad is now constructed, the general direction and location of the new road shall be at least ten miles from the railroad already constructed; but that this section is not to be construed to refer to any point within ten miles of either terminus, or to prevent the roads from running as near to each other for the first ten miles from either terminus as the interest of the company building the new road may dictate. The terminal points of the Macon & Dublin Railroad Company are Macon, in Bibb county, and Dublin, in Laurens county. The terminal points of the Macon & Atlantic Railway Company are Sofka, in Bibb county, and Savannah and a point on the Savannah river, in Effingham county. It is contended that the words "now constructed," in this section of the act, should be construed to mean "now being constructed," or "in process of construction;" and this point was very ably argued by counsel for the defendant in error. We, however, are of the opinion that the words "now constructed" and "already constructed," which appear in this section of the act, mean one and the same thing; so we are to give these words their plain and unambiguous meaning. There can be no doubt that the legislature intended to apply this section to a new railroad chartered under this law where there was another railroad which was then constructed and which had already been constructed at the time of the passage of this act. It seems to us that the words cannot bear a plainer meaning, whatever injustice may be done to a railroad company whose roadbed is in progress of construction by this interpretation of the statute. The words are to receive their plain and obvious import, and we think the maxim, *a verbis legis non est recedendum*, applies in this case. The judgment of the court below, therefore, in granting the injunction restraining the plaintiff in error from build-

ing its roadbed within 10 miles of the roadbed of the defendant in error, is reversed. But we do not by this opinion intimate or decide that the Macon & Atlantic Railway Company can take, use, or occupy any right of way or other property, acquired by or belonging to the Macon & Dublin Railroad Company, unless condemned by the first named company, proper compensation being paid therefor.

Judgment reversed.

CHICAGO, KANSAS & WESTERN R. CO.

v.

WILLETS.

(*Kansas Supreme Court, Jan. 10, 1891.*)¹

Construction of Road—Trespass on Adjoining Land—Measure of Damages.—A railroad company in constructing its railroad upon its own land went upon adjacent land and made excavations to the injury of the owner, and he sued the company therefor, and upon the trial the court instructed the jury that the measure of the plaintiff's damages was the difference in the market value of the land immediately before the commission of the injuries and the market value of the land immediately afterwards. *Held*, not error.

Same—Depreciation of Market Value.—In such case, the owner's land consisted of a tract of six or seven acres, and the excavations covered only about one-fourth of an acre thereof. *Held*, nevertheless, that the owner had the right to recover for the depreciation in the market value of the entire tract.

Same—How Market Value is Determined.—And, in such case, the market value to be considered is the market value of the land for any purpose for which it might be the most advantageously used, and for which it would sell in the market for the highest price.

Same—Admission of Evidence.—*Held*, no material error was committed in the admission of evidence.

Personal Examination of Premises by Jury—Instructions.—The court instructed the jury as follows: "You have the right also to take into consideration in this case such knowledge and information as you may have acquired of the plaintiff's land as to the alleged injuries committed there, by the personal examination of the premises, that you have been permitted to make under the direction of the court." *Held*, that no error was committed in giving this instruction.

ERROR to Wilson District Court.

George R. Peck, A. A. Hurd and Robert Dunlap, for plaintiff in error.

S. S. Kirkpatrick, for defendant in error.

VALENTINE, J.—This was an action brought in the district court of Wilson county by J. R. Willets against the Chicago, Kansas & Western Railroad Company, to recover damages for alleged injuries to real estate. The case was tried before the court and a jury, and the jury re-

Case stated.

turned a verdict in favor of the plaintiff, and against the defendant, for \$400 damages, and judgment was rendered accordingly; and to reverse this judgment, the defendant, as plaintiff in error, brought the case to this court. It appears that the plaintiff below, defendant in error, owned about nine acres of land adjoining the city of Fredonia; that he sold and conveyed between two and three acres of the same to the defendant for a right of way, and for station purposes; that the defendant in constructing its railroad, entered upon the remainder of the plaintiff's land, without his consent, and made excavations thereon from 7 to 10 feet deep, and carried away the earth to the great injury of the land; and for these injuries the plaintiff brought and prosecuted this action.

The first claim of error is that the case was tried by the plaintiff and the court below upon an erroneous theory as to damages. This theory will be apparent from the following instruction given by the court to the jury, to-wit: "The first question for you to consider will be the measure of plaintiff's damages, and upon that point you are instructed that to ascertain the damages to which the plaintiff should be entitled, if any, you will ascertain—*First*, what was a fair, reasonable, market value of the plaintiff's land before the commission of these alleged injuries, and what was the fair market value of the plaintiff's land after the commission of these alleged injuries, and the difference, if any, between these two sums would be the measure of plaintiff's recovery." It is claimed that this instruction is erroneous for the following reasons: *First*, because it permits the plaintiff to recover for all losses, past, present, and prospective, which he had suffered, or might suffer, by reason of the defendant's wrongs, and not merely for such actual loss only as had occurred prior to the trial; *second*, because it permits the plaintiff to recover for the diminished value of the entire tract of land, which consists of six or seven acres, although, as the defendant claims, the excavations covered only about one-fourth of an acre of the tract. Involved in the first proposition is the claim that the diminished value of the real estate injured is no criterion at all for the recovery of damages. We think it is, however. It must be remembered that this is not an action merely for injuries to the plaintiff's possession, as the old common-law action of trespass *quare clausum fregit* was, but it is an action for injuries to the realty itself, to the inheritance; and damages for such injuries may generally, if not always, be estimated by considering the diminished market value of the land. They may, however, be estimated in various ways, generally at the election of the owner of the land. In cases of trespass upon

Theory as to
measure of
damages.

real estate, where no appreciable injury occurs, only nominal damages can be recovered; but, where the injury is appreciable and computable, and is done willfully and maliciously, punitive or exemplary damages may be allowed. But neither of these cases is the present case, and these rules do not apply. But in all cases of injuries to real estate, including the present case, full compensatory damages may be recovered. In other words, the owner of land, for injuries to it by the wrongful acts of another, may recover exact compensation for his entire loss. In giving compensatory damages, various rulings for computing the same are adopted to correspond with the different kinds of cases, and the manner in which they are presented; but generally they are adopted at the election of the owner. Where something is wrongfully taken from the real estate, the owner may, if he chooses, maintain an action of replevin to recover it back; or he may maintain an action for its value; or he may waive the tort, and recover for the amount of the benefit actually received from the thing taken by the wrongdoer; or, where the wrongdoer has occupied the land for some time, the owner may waive all other injuries or losses, and recover merely for the rental value of the real estate while the wrongdoer so occupied it; or, where the injury is of such a nature that the real estate can be restored to its former condition, the cost of restoring the same may be the measure of the damages. But in such cases the restoring of the property to its former condition can generally only be done with the consent of the owner, for the wrongdoer, without the consent of the owner, cannot be allowed to re-enter the premises, and thereby commit another and a new trespass for the purpose of restoring the property. *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224. In cases where the wrongdoer has the power, without committing any new wrong, to restore the property to its former condition, it will generally be presumed that he will do so, and he will generally be given an opportunity to do so; and, in such cases, the owner will generally be permitted to recover only for his actual loss up to the time of the commencement of his action, or, at most, only up to the time of the trial. And in such cases, in order that full and complete justice may be awarded to the owner, he will be permitted to commence and prosecute a new action for each and every succeeding or recurring loss occasioned by the original injury until his property shall be finally restored to its former condition. This is particularly true where the wrongdoer has the right, and the owner of the land has not the right, to restore the property to its former condition; as where the thing that causes the injury to the owner's land is upon the land of another, and where it

only indirectly affects his land. But in cases like the present the owner may recover for his entire loss in one action, and only in one action, and he may so recover the same if he chooses, by recovering for the depreciation in the market value of his land caused by the injuries thereto committed by the wrongdoer. 3 *Suth. Dam.* 372-374, 392-394, 5 *Am. & Eng. Ency. Law*, 16, 20, 36. This is, in fact, a recovery only for the loss occurring prior to the commencement of the action, although it may also to some extent have in contemplation the future. The loss, as thus recovered for, is precisely the loss which occurred at the very time at which the injury was consummated. In many cases the depreciation in the market value of the land, and the cost of restoring it to its former condition, would be precisely equal. In the first of the above authorities, the following language is used: "In general, this damage is the amount the estate is diminished thereby in value." Page 393. In the last authority cited, the following language is used: "In cases of trespass, the cause of action is the wrongful act of the defendant, and the injury resulting is merely the measure of the damages. Therefore, applying the rule above, all damages for a trespass must be recovered in a single action." Page 16. "In actions for injury to real property, where the injury is done to the realty itself, the measure of damages is the difference in the value of the land before and after the trespass, or, in some cases, the amount necessary to restore the property to the condition in which it was before the trespass was committed." Page 36. Also, in all cases where damages may be recovered for the depreciation in the market value of real estate caused by injuries thereto, the owner may recover for the depreciation in the market value of the entire tract, although the injury may, in fact, be directly only to a portion of the tract. See the above authorities, and also the following: *Kansas City, E. & S. R. Co. v. Merrill*, 25 *Kan.* 421, 2 *Am. & Eng. R. Cas.* 485; *Com'rs of Smith Co. v. Labore*, 37 *Kan.* 480; *Central Branch U. P. R. Co. v. Andrews*, 41 *Kan.* 370, 379; *St. Louis, Ft. S. & W. R. Co. v. McAuliff*, 43 *Kan.* 185.

The plaintiff also in this case showed the exact location of his land, how it was situated with respect to the city of Fredonia, and its streets, and the railroad, etc., and for what purposes it might be used; and the jury were also permitted to see it. We do not think that there was any error in this; for, when the question of the value of real estate is in issue, the owner is entitled to show its market value for any purpose for which it might be most advantageously used, and for which it would

**Depreciation
in market
value may be
recovered.**

**Determina-
tion of market
value.**

sell in the market for the highest price. *King v. Minneapolis Union R. Co.*, 32 Minn. 224, 17 Am. & Eng. R. Cas. 93; *Com'rs of Smith Co. v. Labore*, 37 Kan. 480, 484, 485; *Cohen v. St. Louis, Ft. S. & W. R. Co.*, 34 Kan. 164, 22 Am. & Eng. R. Cas. 116, and cases there cited; *Com'rs of Dickinson Co. v. Hogan*, 39 Kan. 606; *Kansas City & S. W. R. Co. v. Ehret*, 41 Kan. 24. The question to be considered is really what was the property worth immediately before the injury, if used for the purpose for which it could be the most advantageously used, and what was it worth in the same condition except for the injury immediately afterwards if it were used for the purpose for which it could be the most advantageously used?

It is also claimed that the court below erred in permitting oral testimony to be introduced tending to contradict the effect of the deed executed by the plaintiff to the defendant. The plaintiff's counsel, however, stated at the time it was introduced that it was not introduced for that purpose, and the court did not permit it to go to the jury for that purpose; and the court afterwards instructed the jury that it could not be used for that purpose. The real object of the testimony seems to have been to show that the trespass was committed willfully and maliciously; but, if no exemplary damages were allowed, it really answered no purpose.

Admission of evidence.

It is also claimed that the court below erred in giving the following instruction: "You have the right also to take into consideration in this case such knowledge and information as you may have acquired of the plaintiff's land as to the alleged injuries committed there, by the personal examination of the premises, that you have been permitted to make under the directions of the court." Under the decision of this court in the case of *City of Topeka v. Martineau*, 42 Kan. 387, 28 Am. & Eng. Corp. Cas. 217, this instruction was not erroneous. We do not think that any material error was committed in this case, and therefore the judgment of the court below will be affirmed. All the justices concurring.

Inspection by jury—Instruction.

Construction of Side Track on Company's Own Land—Temporary Injunction—Modification.—Temporary injunction modified so as to allow the company to complete over its own land the sidetrack already commenced, and to use the same until a final adjudication is had in the cause; this side track not touching any property of the complainants, and its construction and use being (according to the evidence) more likely to lessen than increase their annoyance or damage for the present. *Savannah, A. & M. R. Co. v. Fort*, 84 Ga. 500.

Construction of Side Track under Contract for Right of Way—Loss of Contract—Action Against Company for taking up Rails.—In *Spoon v. Chicago, & W. M. R. Co.*, (Michigan, June 5, 1891), 49 N. W. Rep. 35, an action was
47 A. & E. R. Cas.—21

brought against a railroad company for the value of certain rails taken by it from a side track on plaintiff's land. The side track was constructed under a written contract which had been lost. It was provided by this contract that the plaintiff granted a right of way to the company in consideration of its putting a depot and side track on his land. On the trial the court instructed the jury that they must determine from all the evidence, whether under the contract the side track belonged to plaintiff or to defendant, and that if they found it belonged to plaintiff, he was entitled to recover the value of the rails at the time they were taken up and converted by defendant. *Held*, that these instructions were proper.

POST

v.

WEST SHORE & BUFFALO R. CO.

(123 *New York*, 580.)

Grant of Right of Way Including Fee in Public Highway—Reconstruction of Highway on other Land—Public Policy.—Where the right of a railroad company to construct its road in a public highway is regulated by statute, and the law provides that in case of such construction the company must restore the highway to its former usefulness or construct a new one, a deed to a railroad company, conveying the fee in a public highway and other land for a right of way, in which the company covenants to restore and reconstruct the highway on the other land, is not against public policy, as being a contract between private parties for the abandonment of a part of an existing highway, and the substitution of a new location to take the place of the highway so abandoned. The fact that the town commissioner objects to the restoration of the highway in the manner provided in the deed will not release the railroad company from its covenant contained therein, for the company is under no legal compulsion to follow his direction in the matter.

Same—Damages for Failure to Restore Highway.—In such case the railroad company failed to restore the highway as agreed in the deed, whereby the grantor was compelled to use another road which compelled him to travel one and one quarter miles further in the transportation of his farm products. *Held* that \$2,500 damages was not excessive where the company is relieved from restoring the highway which would cost \$13,000.

APPEAL from Supreme Court, General Term, Third Department.

This action was to enforce the specific performance of an alleged covenant for the reconstruction and restoration of a public road, and the construction of a railroad crossing, contained in a deed executed by the plaintiff to the New York, West Shore & Buffalo Railway Company, dated February 8, 1882, conveying a strip of land running northerly and southerly through the plaintiff's farm in the town of Catskill, in the county of Green, in this state, 130 feet in width and 1,500 feet in length, which strip of land included the public highway through said plaintiff's farm, known as the "Catskill

and Saugerties Road." The plaintiff, prior to, and at the time of, said conveyance, was the owner of a valuable farm of 260 acres on the westerly shore of the Hudson river, through which ran northerly and southerly a rocky ridge known as "Calkberg Mountain," dividing the lowlands of the plaintiff's farm on the river from the upland. Along the easterly foot of the ridge ran the Catskill and Saugerties highway, communicating with Catskill on the north, and with Saugerties and other places on the south. The plaintiff's house and farm buildings were located near to, and on the easterly side of, the highway. In 1882, the New York, West Shore & Buffalo Railway was engaged in the construction of its railway, the line of which at this point ran within and along the highway, across the plaintiff's premises. The railway company, in view of this fact, purchased from the plaintiff the strip mentioned, and the deed of conveyance from the plaintiff contained the following clause: "The party of the second part [the railway company] is to reconstruct and restore the public road, and place the same along the westerly line of and upon the aforesaid premises. The party of the second part is to construct a good and convenient crossing over the said railway premises to the highway, reconstructed as aforesaid." The conveyance to the company was in terms of "fee-simple." The company thereupon took possession of the highway, and raised an embankment on the easterly side of the strip so conveyed, for the track of its road, from 14 to 20 feet high, across the plaintiff's farm, and completely shut off all approach to the plaintiff's buildings over the highway from the south, there being a ravine on the southerly side of his land, which embankment also prevented his reaching the highway to the north except by climbing the railroad embankment near the northerly line of his premises. Neither the New York, West Shore & Buffalo Railway Company, nor its successor in title, the West Shore Railway Company, nor the New York Central & Hudson River Railroad Company, the lessee of the West Shore Railway Company, has constructed the highway on the westerly side of the 130-foot strip, as provided in the deed. But, in the fall of 1882, the grantee in the deed purchased from the plaintiff another strip of land across his farm, 50 feet in width, on the top of the mountain for a public road, and opened it as a public road, and connected it at the north and south with the old highway, and it has since been used by the public as such in place of the original road at the foot of the hill. The company also made an approach up the embankment on the north side of the plaintiff's farm, to enable the plaintiff to reach the old highway north of his premises. The plaintiff, by reason of

the situation, when he desires to go from the 145 acres of his farm on the river to Saugerties, or any other market south of his premises, is compelled to first go north, climbing the embankment to the junction of the old road with the new road, across the hill, and then turn southerly and go over the hill road until it meets the original highway south of his lands, a route much less convenient than the former one, thereby increasing on each strip the distance to be traveled about one and a quarter miles. In respect to the new road, and the purchase of the strip 50 feet in width therefor, upon which one of the points made by the defendants is based, it appears that, in constructing the embankment, the railroad company blocked and obstructed the old highway so as to prevent its use, and the commissioner of highways threatened legal proceedings; and it also appears that he objected to placing the highway on the 130-foot strip, on the ground that horses would be frightened, etc. The original company thereupon applied to the plaintiff to purchase a strip on the hill for the highway and did make such purchase, paying the plaintiff \$500 for the land. But the plaintiff expressly refused to release the company from the obligation under the covenant in the original deed; and insisted that the company should build the road on the west side of the 130 feet, as provided therein. It was shown on the part of the defendants that the construction of a highway under the hill, as provided in the covenant, would, by reason of the blasting which would become necessary, and other difficulties, be very expensive, and would cost from \$12,000 to \$14,000, and that the company had expended from \$6,000 to \$10,000 in constructing the road over the hill. Subsequent to the commencement of this action, the New York, West Shore & Buffalo Railway Company became insolvent, and its property was sold on foreclosure, and was purchased by individuals who subsequently conveyed it to a new corporation, the West Shore Railway Company, which latter company leased it by a perpetual lease to the New York Central & Hudson River Railroad Company. The two latter corporations were brought in as parties defendant. There was proof tending to show that the value of the plaintiff's farm had been greatly impaired by the obstruction of the old highway, and that it would be worth \$5,000 more than it now is if the covenant in the original deed had been performed. The judgment of the court awarded the plaintiff \$2,500 as damages for the failure to construct the road as provided in that deed, and adjudged that the defendant the West Shore Railway should construct a crossing under its road at a point indicated, to enable the plaintiff to reach the old highway and the new road over the hill.

Hamilton Harris, for appellants.

J. A. Griswold, for respondent.

ANDREWS, J.—The New York, West Shore & Buffalo Railway Company, by the acceptance of the deed of February 8, 1882, became bound to perform the obligation recited therein to locate the highway on the westerly side of the strip of land conveyed by the deed, and to construct a crossing for the use of the plaintiff. The undertaking of the corporation was a part of the consideration of the grant, and, although the deed was not signed and sealed by the corporation, it became effectual on delivery to and acceptance of the same by the grantee as a contract on its part to perform the undertaking recited, (*Dock Co. v. Leavitt*, 54 N. Y. 35;) and, upon a refusal of the company to perform, the plaintiff was, according to the general rule, entitled to maintain an action for specific performance or for damages. It is not denied that the West Shore Railway Company, the successor in title of the original corporation, on becoming vested with the rights and property which belonged to its predecessor, also became subject to and bound by the same obligation in respect to the highway and the railroad crossing, created by the deed of February 8, 1882, which before rested upon the grantee therein alone. The deed under which the West Shore Railway Company acquired its title is not printed in the case, and, so far as appears, that company may have expressly assumed the performance of the obligation of the prior company. If that fact is material, it must here be assumed. The point is now made in behalf of the defendants that the contract between the plaintiff and the New York, West Shore & Buffalo Railway Company is void as against public policy, because as is claimed, it is a contract between private parties providing for the abandonment of a part of an existing highway, and the substitution of a new location to take the place of the highway so abandoned, without the sanction of the commissioner of highways of the town. We are of opinion that this contention cannot be supported.

The New York, West Shore & Buffalo Railway Company did not acquire its right to construct its road upon and along the Catskill and Saugerties highway as against the public by virtue of its deed from the plaintiff of February 8, 1882. The right to use the highway for the purpose was vested in the corporation by the general railroad act on obtaining the consent of the supreme court, subject only to the duty to restore it to its former state, "or to such state as not unnecessarily to have impaired its usefulness." (Laws 1850, chap. 140, § 28, subd. 5; Laws 1880, chap. 133;) and, when it becomes

necessary for a railroad company, in order to discharge the duty of restoration, that the highway interfered with should be removed in whole or in part outside of its original limits, the corporation may acquire by purchase or condemnation the lands necessary for the purpose, and the reconstructed highway in the new location becomes a part of the legal highway, (*People v. Dutchess & C. R. Co.*, 58 N. Y. 152.) The corporation has in general the right to determine the route of its road except where its line is coincident with the route of a highway, subject to the right given by statute to parties interested to apply for a change of location in the manner provided. The commissioner of highways is vested by statute with the care and supervision of the highways of the town, (1 Rev. St. p. 502, § 1;) but this, we think, gives him no power to control the location of the railroad within the line of the highway. That power is vested in the railroad corporation, subject to the approval of the supreme court. The statute requires notice of the application to the court to be given to the highway commissioner. But his consent to the location of the railroad within the limits of the highway is not required, and if given, would confer no authority upon the company in addition to what it before possessed; so also in respect of the duty imposed on a railroad company whose road is located in a highway to restore it to its former state, or to such state as not unnecessarily to impair its usefulness. The duty is solely a corporate duty which the company is bound to perform, and for any failure in its performance, in addition to other remedies, the commissioner of highways is authorized, by chapter 255 of the act of 1855, to maintain an action to enforce the performance, or for damages sustained by the town from non-performance. But it is for the company, in the first instance, to determine the method of restoration. The responsibility is not divided between the company and the commissioner. The obligation is cast upon the company, and "it takes the risk of its act being in accordance with its obligation." *JOHNSON, J., Wademan v. Albany & S. R. Co.*, 51 N. Y. 570. See, also, *People v. New York Cent. & H. R. R. Co.*, 74 N. Y. 302; *People v. New York, N. H. & H. R. Co.*, 89 N. Y. 266, 10 Am. & Eng. R. Cas. 230. In the present case the company, by the deed from the plaintiff, acquired the fee to the highway, subject to the public easement, and additional land adjoining sufficient for the highway when changed. We think the contract between the parties providing how the restoration should be made was legal. The public were not concluded, and its right of action for a failure by the railroad company to perform its statutory duty remained unimpaired.

It is further contended that the performance of the contract on the part of the railroad company was prevented by the action of the town commissioner. It appears that, in the fall of 1882, he objected to the construction by the company of the new highway under the hill for prudential reasons. The answer heretofore given to the point made that the contract was opposed to public policy applies here also. The commissioner could not dictate how the work of restoration should be accomplished. It might be very reasonable that the company should desire to consult the wishes of the town officers on the subject, and thereby avoid any future question or difficulty. But the covenant with the plaintiff was not discharged by the objection of the commissioner, for the company was under no legal compulsion to follow his direction in the matter. It certainly does not appear that the construction by the company of the highway at the place agreed upon between it and the plaintiff would not have satisfied the statutory duty resting on the company. Moreover, we think it is a very grave question whether, assuming that the company had no right as between itself and the town to locate the road under the hill, the plaintiff was not nevertheless entitled to enforce the contract so far as to give him a road for his use at the place indicated. The main purpose of the contract was to insure the plaintiff a convenient road to and from his premises. This the plaintiff could have provided, although the road should no longer continue a public legal highway. Story, Eq. Jur. § 779.

The point that the plaintiff waived the provision in the contract by selling to the company the land for the road over the hill, and receiving pay therefor, followed by the construction of the hill road by the company at large expense, is not supported by any facts proved or found, and in addition, which alone is conclusive, the defendant's counsel did not request any finding on the subject, nor is the point raised by any exception in the case. The facts show that there was no waiver, and, that, in the negotiation which resulted in the second purchase, the plaintiff expressly refused to release the company from the original contract, and insisted upon the road provided for therein. Under such circumstances, there could be no estoppel.

The point that there was no evidence to justify the court in awarding \$2,500 damages for the non-construction of the road provided for in the covenant is not, we think, well taken. The witnesses placed the damage to the plaintiff's farm by reason of the obstruction of the old highway, and the failure to construct a new one under the hill, in the aggregate, at \$5,000. The claim is that, as the damages arose

from two causes, the non-construction of the road, and the failure to build the crossing, and as the damage from each cause was not separately stated by the witnesses, they could not be separated by the court in its findings. But, by stipulation of the parties, the court, after the testimony was in, viewed the premises. There was evidence in the case showing the increased cost of carrying on the farm by reason of the plaintiff being cut off from the use of the old highway, and being required to use the hill road in the transportation of the products of the farm, enough we think, to justify the specific finding in question. The defendants cannot justly complain of any injustice. By the judgment, they have been relieved from a specific performance of the contract to construct the road, which they proved would cost \$13,000, and in lieu of such performance a payment of \$2,500 damages was adjudged. There was no error, we think, in decreeing a specific performance of the contract to construct a crossing, nor in requiring that it should be under and not over the track. See *Jones v. Seligman*, 81 N. Y. 191, 3 Am. & Eng. R. Cas. 236. There was error, we think, in charging the West Shore Railway Company with damages at the rate of \$200 per year, which accrued prior to December 5, 1885, the date when that company obtained its title. The sum of \$600 should therefore be deducted from the judgment, and as amended, the judgment should be affirmed, without costs in this court to either party. All concur.

Subscription to Bonus Offered Railroad Company for Extension of Road—Failure to Raise Required Amount—Withdrawal of Subscription.—In *Buchel v. Lott*, (Texas Court of Appeals, January 18, 1890,) 15 S. W. Rep. 413, it was held that a person who signs a subscription list binding himself to pay a certain amount to a railroad company if its road should be constructed to a certain point within a certain time, which list was prepared by the citizens of the place to which the road was to be extended in response to a proposition from the company that it would extend its road to that place for a bonus of \$25,000, is liable for the amount of his subscription although it appears that the list aggregated only \$23,000, which was at once rejected by the company; after which defendant notified the committee in charge that he withdrew his subscription, and with the knowledge of this withdrawal, the company agreed with the committee to construct the road for the \$23,000 subscribed, which was done within the six months prescribed.

BARR *et al.*

v.

NEW YORK, LAKE ERIE & WESTERN R. CO.

(125 *New York*, 263.)

Fraud as a Ground for Avoiding Obligation.—Fraud furnishes ground for rescinding a contract and for avoiding an obligation imposed; but such obligation cannot be assailed as a means of continuing in the possession of property which the contract, legal in itself, was designed to, and did transfer.

Same—Contract of Corporations With Directors—Lease of Road Constructed by Them.—Where a railroad company leases another road constructed by a syndicate of its directors, to whom all the bonds and stock of the new road, amounting to almost twice the amount of the cost of such road, were issued, and the old company agrees to pay the new company an extravagant rental, and it appears that the lease is made in pursuance of a corrupt scheme to impose upon the old company an obligation for the benefit of some of its directors, the obligation of such lease is voidable, but not void.

Same—Ratification of Lease by Stockholder.—By the terms of such lease, which was executed in July, 1870, the old company agreed to pay a rental equal to thirty per cent. of the new road's gross earnings, and guaranteed that such sum should never be less than \$105,000 per annum, or seven per cent. of the total issue of bonds and stock. This guaranteed rental was paid until January 1, 1872, after which, and until the beginning of the suit, only \$70,000, or seven per cent. on the bonds was paid annually. The old company became insolvent in 1875, a mortgage was foreclosed in 1878, and the defendant company purchased the road, assuming all the obligations of the receiver. The plaintiffs were stockholders in the new company, having received their stock as members of the original construction syndicate, and brought this suit in 1880 to recover the remainder of the rental due under the lease. The old company never ceased to operate the new road under the lease, and in order to reduce the amount of the obligation thereunder, the receiver and the management preceding him purchased all the new company's stock, except that owned by the plaintiffs. *Held*, that it was error to dismiss the plaintiff's complaint on the merits, since the course of dealing had amounted to a ratification of the lease.

APPEAL from Supreme Court, General Term, First Department.

The plaintiffs, as stockholders of the Suspension Bridge & Erie Junction Railroad Company, have brought this action against that company, the New York, Lake Erie & Western Railroad Company, and Hugh J. Jewett, as receiver of the Erie Railway Company, as defendants, to compel the payment of certain rental moneys, which were payable according to the terms and provisions of a lease under which the New York, Lake Erie & Western Railroad Company is now operating the road of the company. The action was instituted by the

plaintiffs, because the lessee company owned all the rest of the stock of the lessor company, and through its possession had obtained the control of its management and board of direction. Upon the trial, the complaint was amended by striking out the Erie Railway Company as a party defendant, and the recovery sought is actually against the present corporation, which is in possession of the leased road, as successor to the Erie Railway Company, and to Jewett as its receiver; and the demand covers the period commencing with and continuing since his possession and operation as such receiver. The facts proved concerning the origin and history of the lease in question, and which exhibit the acts of all the parties, are not in dispute. In October, 1868, the plaintiffs' company was incorporated to construct and operate a railroad in order to connect that of the Erie Company, at the city of Buffalo, with the Canadian system of railroads, by way of the falls of Niagara. This was unquestionably a desired and much needed connection. The then Erie management promoted the formation of this company, and some of its incorporators were directors of the Erie Company. Various schemes of construction were prepared and abandoned, but in June, 1870, a contract was made, by which Mortimer Smith agreed to build the road, and the Suspension Bridge Company agreed to issue in payment therefor \$1,000,000 of its 7 per cent. bonds, and \$500,000 of capital stock; these issues to constitute the whole of its stock and bonded debt. Of the directors who authorized this contract several were also Erie directors. Smith was an assistant secretary of the Erie Company, and was a mere figurehead, or conduit of interest; for on the same day, a syndicate was formed composed wholly of members of the board of directors of the Suspension Bridge Company, whose agreement was to subscribe and take the stock and bonds from Smith as they were received, and to whom, a few day later, in June, upon their request, Smith assigned his contract. In July, 1870, the lease in question of all the property and franchises of the plaintiffs' company was executed. Its execution had been authorized, in the previous month, at a special meeting of the Erie board of directors, their resolution reciting the project of the road, the issuance of bonds for completing it, and directing a lease, in which the rent reserved should be fixed at a sum equal to 30 per cent. of the gross earnings of the leased road, and guarantying that such sum should never be less than \$105,000 per annum. In November following, the executive committee of the Erie Company, by resolution which recited the making of the lease, and the guaranty by the lessee of a rental of \$105,000 equal to 7 per cent. interest

on the issue of bonds, and 7 per cent. dividend upon the \$500,000 of capital stock, authorized the execution of a guaranty of the payment of a semi-annual dividend of $3\frac{1}{4}$ per cent. upon the stock. In December, 1870, the road being then almost, but not in all respects, completed, it was taken possession of by the Erie Company. In February, 1871, the directors of the lessor company formally ratified the lease. There had been expended by the syndicate in construction work about \$850,000, of which plaintiff Barr and plaintiff Bush's assignor had contributed each their due proportion. The stock and bonds had been issued to the members of the syndicate, and, of the former, plaintiff Barr received 335 shares, and plaintiff Bush's assignor received 330 shares, of which 80 were assigned to Bush. The Erie Company paid the full amount of the rental moneys, in interest on bonds and dividends on the stock, down to January 1, 1872, and, since then, only an amount of money equal to the interest on the issue of bonds has been paid. In March, 1872, a change occurred in the Erie management, which was overthrown, and the road then came under the direction of a board presided over by John A. Dix. In May, 1875, the Erie Company became insolvent, and Hugh J. Jewett was appointed by the court as its receiver. Under the court's authority to that effect, he continued to operate the leased road as a part of the Erie's system of connections. Between the years 1872 and 1876, the Erie Company and its receiver Jewett acquired, at various prices, by negotiation and by purchase, practically all of the stock of the Suspension Bridge Company, except what the plaintiffs possessed. With this ownership of the capital stock, the management of the Erie Company and of its successors in interest obtained complete control, and have elected directors in their company's interest. In 1878, the defendant the New York, Lake Erie & Western Railroad Company became the owner of the railroad properties and assets of the Erie Company, by conveyance from a purchasing committee, who bought them in at a sale in mortgage foreclosure, and included in this conveyance was the leased property of the Suspension Bridge & Erie Junction Railroad Company. The grantee also covenanted to assume the payment of all of the receiver's liabilities. At all times the Erie Company, its receiver, and its successor, the present company, have operated the Suspension Bridge road under the lease, as an integral part of the Erie road; but they never have paid since January 1, 1872, other rent than \$35,000 semi-annually, in the shape of the interest due upon the lessor's bonds. It was found by the trial court that at no time would 30 per cent. of the earnings from the operation of the leased road equal the guarantied rent.

The lessor company's stockholders had, in August, 1872, requested its board of directors to take the proper steps to collect the amount due by the terms of the lease, and that board did direct a formal demand to be made and proceedings to be taken. It was subsequent to these steps that measures were taken and negotiations entered into by the Erie Company to purchase the whole of the lessor's stock. The trial court found that the "syndicate, consisting of members of the board of directors of the Suspension Bridge, etc., Company, and of the Erie Railroad Company, fraudulently caused the contract to be made * * * with Mortimer Smith," and its assignment to themselves, and that it was designed for their benefit and gain solely, and to the loss of the Erie and Suspension Bridge Companies. He found that the execution of the lease and of the guaranties was fraudulently induced by the syndicate. His conclusion, upon all the facts, was that the complaint should be dismissed, and the defendants had judgment accordingly. At general term the judgment was sustained. The opinion of the learned judge who spoke for that court proceeded mainly upon the ground that, as there were four persons interested in the contract for the building of the road, and in the receipt of the bonds and stock payable therefor, who were directors in each of the companies, it could confer no rights; and, to use his words, "the agreement of lease created no binding obligation." It was "incapable of performance through the instrumentality of courts of justice." Rescission, in his opinion, was not required to enable the parties to the agreement to avail themselves of the invalidity of the lease, and continued possession does not aid the right to recover rental moneys. From the judgment of affirmance, the plaintiffs have appealed to this court.

Elihu Root, for appellants.

Wm. W. MacFarland, for respondents.

GRAY, J.—There is no conflict of evidence, nor any dispute about the facts which I have stated above. The plaintiffs' appeal questions the correctness of the legal conclusion which has been deduced from these facts. In reviewing that conclusion we should not lose sight of what the action was intended to accomplish, and that was, simply stated, to compel the New York, Lake Erie & Western Railroad Company to pay for the use and operation of the railroad and property of the Suspension Bridge & Erie Junction Railroad Company, the consideration or rental moneys secured to be paid by the contract of lease of that company, through which the right of possession and use was derived. This is not an action to compel a specific

Purpose and
nature of the
action.

performance of some executory agreement, but it is one to compel the defendant, as the successor in interest of the lessee company, to pay that which the contract of lease bound the lessee and its successors to pay as a condition of the right to have and to operate the leased road. The question which is raised by the defense to the action is whether the fraudulent nature of the acts and proceedings, by which the railroad was constructed, and the contract of lease effected, are matters which have reached in their vice so far as, at this day, to disable the plaintiffs from enforcing against the lessee of their company the payment of the full amount of rental stipulated for in the lease. I cannot think that such is the result, or that the law intends such consequences to attach, as the respondent claims, and as the courts below have held. There is something repugnant to our sense of justice, and a seeming subversion of ideas respecting property rights, in the position that property may be retained and enjoyed, and payment of the stipulated rental therefor refused by its holder, on the plea of fraudulent practices, or because of the immoral conduct involved in the making of the contract by which the property was transferred, and the obligation to pay imposed. We would naturally reason that these considerations furnished grounds for repudiating a transaction so tainted, and for refusing to remain under the obligation to keep and pay for the use of the property; but our reason fails to make it evident how, with knowledge of the fraud or immorality practiced, and with opportunity to act in repudiation, the party may retain possession, and enjoy the advantages which possession gives, and, nevertheless, refuse the payment which was the condition of the right to its possession and use. Fraud furnishes ground for rescinding a contract, and for avoiding an obligation imposed, but I do not understand that, while serving to divest the obligation, it can be availed of as a means of continuing the possession of the property which the contract, legal in itself, was designed to and did transfer. I assume that the right of the plaintiffs to maintain an action to enforce the claims of the Suspension Bridge Company is not disputed, save in the respects that the general issue of stock is alleged to have been fraudulent and void, and that the existence of any enforceable rights is denied. Nor could their right as stockholders to prosecute such a cause of action be seriously questioned, inasmuch as their corporation is wholly under the control of its lessee, the defendant proceeded against. Its directors are elected and manage its affairs solely in the interest of the lessee company. The lessor company as a corporation is therefore in no position to assert any rights

Fraud as a ground of avoiding obligation for lease.

against the lessee, and under well settled principles, if there are rights which are suffered to remain unenforced, its stockholders may assert and maintain them in equity. Ang. & A. Corp. § 312; Robinson v. Smith, 3 Paige (N. Y.), 233; Brinckerhoff v. Bostwick, 88 N. Y. 52, 56; Detroit v. Dean, 106 U. S. 537, 1 Am. & Eng. Corp. Cas. 327.

The respondent has questioned the legality or validity of the issue of shares upon which plaintiffs base their right to sue. I do not think it is in a position to raise that question, and for several manifest reasons. All of the stock and bonds were issued in payment for the construction of the railroad, and were taken by a syndicate of persons who assumed the contract for the work. It is true that that syndicate was made up of members of the board of directors, but, as the members of the syndicate were practically the company, and composed the whole number of stockholders, there was no one to object, and the manner in which they chose to divide up their interests in the proprietorship of the corporation, and to represent them in shares, concerned only themselves. No principle of law forbade the company agreeing to pay for the construction of its railroad in the way or in the amount it did. Van Cott v. Van Brunt, 82 N. Y. 535. If the company's directors were interested in the work and profits of construction, and evaded a direct contract through the form or device of an intermediary contractor, that was a matter for the company, or for its stockholders, to take hold of. But the stockholders and the members of the syndicate were the same persons, and, however wrong the transaction might be, if other persons were concerned, here no injury was affected to any one interested in the corporation, and, however illegal the transaction, there was no person apparently to complain of it. As the stock was issued as a part of the consideration for construction, it cannot be said that it was taken without value given, and the mode of its apportionment or division concerned only those interested in the contract through which it was received as payment. We may concede that the contract was voidable as a scheme concocted by the directors for sharing in the profits of construction, but the difficulty is that all the members of the corporation were assenting to it. There was, therefore, in fact, no fraud practiced upon the company. Practically the promoters of the corporation, in this way, placed a valuation upon the corporate properties and franchises, which the contribution and expenditure of their money created, and the fact that they were created for an expenditure less than the par value of the aggregate issue of capital stock and bonds does not affect the question at all. The stock so issued con-

Legality of issue of shares to syndicate.

stitutes the only stock of the company, and is represented in the holdings of the plaintiffs and of this respondent, the New York, Lake Erie & Western Railroad Company. Their shares stand on precisely the same footing as to validity. The plaintiffs were parties to the construction contract, and the original holders of the respondent's shares received their stock in the same way and for the same consideration. The contention is therefore brought to this point: Did the Suspension Bridge Company have a cause of action against the present successor in interest of its original lease? All questions are eliminated from the controversy as to the liability of the New York, Lake Erie & Western Railroad Company to the Suspension Bridge Company, save the one of whether the taint of original fraud in the procurement of the lease operates to prevent the enforcement of the obligations of that instrument. That the contract of lease was voidable and quite indefensible, because of the immoral conduct of directors, who abuse their trust in procuring its execution, I quite concede. The proofs could lead to no other finding than that the lease and the rental guaranties were the work of a combination or syndicate, composed of members from the boards of directors of the two companies, who caused the same to be made by the Erie Company for purposes of their own individual gain, and in fraud of that company's rights. The identity of certain of the directors of each company when the lease was made, the interest of four of these common directors in the contract for the construction of the Suspension Bridge road, and in the stock and bonds, to be guarantied as a condition of the leasing of the road, stamped the whole transaction as a fraud upon the Erie Company, and brought it under the condemnation of the rule which forbids those who fill fiduciary positions from making use of them to benefit their personal interests. This rule is deservedly strict in its requirements and operation. It extends to all transactions, where the individual's personal interest may be brought into conflict with his acts in a fiduciary capacity, and it works independently of the questions of whether there was fraud, or whether there was good intention. Where the possibility of such a conflict exists, there is the danger intended to be guarded against by the absoluteness of the rule. *Davoue v. Fanning*, 2 Johns, Ch. (N. Y.), 260; *Barnes v. Brown*, 80 N. Y. 527. But the rule does not operate to avoid *ab initio* all transactions of a trustee, where he is interested, but is generally limited in its operation to rendering them voidable at the election of the party whose interests are concerned in the question of their affirmance, or disaffirmance. Lease not void
ab initio. If, therefore, nothing is done in avoidance, the transaction

remains. If knowledge and opportunity concur whereupon to move, delay, if unreasonable, or attended by retention and enjoyment of the results of the transaction, may be deemed equivalent to an adoption and ratification of that which before was the subject for action, in repudiation of any obligation. The rule is not designed to work injustice, but to protect those who repose confidence, voluntarily or perforce, in others holding towards them fiduciary positions, and to whose care have been confided the management and custody of property and of interests. *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 193-199, 4 Am. & Eng. R. Cas. 293. But that the plaintiffs were parties to a scheme for imposing a continuing obligation upon the Erie Company, and knew or were chargeable with knowledge of the fraudulent devices to bring about that obligation, are not sufficient at this day as facts in defense of this action. It is the respondent's own attitude, and the conduct and acts of its predecessor in interest, which create the difficulty in defending against the demand of these plaintiffs.

The vice in the original transaction, from the collusion between a combination of the common directors with others, does not necessarily so inhere in the agreements of the lease, as to prevent ratification, or to survive acts amounting in effect to acquiescence and waiver on the part of the Erie Company and its successors in interest. It may be adverted to here that the particular loss and disadvantage, which resulted to the Erie Company from these transactions in 1870, were in the imposition upon it of the burden of a rental greater in amount than it would have been, if it had been measured by a percentage upon the actual ascertained cost of construction. There is no question but that the road was deemed to be an important construction for the Erie Company, and it appears, affirmatively, in this record that, as a link in the connections of that company, it was a most valuable adjunct. From March, 1872, the time when a change occurred in the management of the Erie Company, and payment was refused of that portion of the rental represented by the guaranty of dividends upon the stock, nothing was done to avoid and rescind the contract of lease. Then was the opportunity to take advantage of the legal fraud in its procurement, and there must have been knowledge then as to the facts surrounding the lease, for refusal to pay upon the stock evidences it, as does the subsequent effort to buy up the stock. But, as appears from a report of the president, Mr. Dix, to the stockholders, in July, 1872, this leased road was indispensable as a route to Niagara Falls, and as a connection with Canadian roads.

Ratification
and waiver by
Erie Company
and its suc-
cessors.

When, in 1875, the Erie road was operated by a receiver, he continued the use of this leased line, reporting, with respect to it, that it was a necessity to the Erie road, and that it was not thought best to abandon it, but rather to reduce the rental by buying up its capital stock. And, finally, when, in 1878, two years before this action was commenced, the New York, Lake Erie & Western Railroad Company was organized, and took over the road, properties and assets of the Erie Company, there was included in the purchase thereof this lease, and the leased properties were operated in connection with Erie's main line. If these facts do not clearly evidence an election to abide by the lease which had been made with the Erie Company, and to waive any irregularities or fraud in its execution, it is not easy to understand how such acts could ever be evidenced. The ratification of this lease was not necessary to be shown by any particular or peculiar act. A course of conduct and the retention of the property might be sufficient to make it a valid contract by acquiescence. To be silent and to hold and use the leased property as its own were incompatible with the maintenance by the Erie Company of a serious claim to rescind for fraud. I think it quite incompatible with the principles upon which equity proceeds to hold and use property, the only right to which is derived through a contract of lease, and to refuse payment of a part of the rent stipulated in the contract, on the ground of the existence of fraud in its procurement. The contract was not severable, nor the consideration apportionable. If it was bad for some fraud in the agreement, then it was voidable as a whole. The Erie Company or its successor could not adopt in part and repudiate in part. They could not be heard to say: "We want and will keep this railroad branch, but we will not pay the whole of the rental agreed upon for its use in the lease. We will not pay the guaranteed dividends upon the capital stock, and, if an attempt is made to force us pay them, we will set up fraud in the making of the lease, and will assail the complainants standing as stockholders." There can be no such fast and loose playing with legal rights. I have said that this contract of lease was voidable and not void, and therefore could be, and was, upon the showing of this record, validated by acquiescence and adoption. It was a good enough contract at law, but, because of the immorality of directors, common to both contracting companies, combining to procure the execution of a contract, in which they were personally interested, a court of equity could interfere and set it aside at the instance of the injured party. The right, however, to invoke the equitable interference of the courts, depends upon the circumstance of the case, and aid will be

denied where, in a case like the present one, the contract has been executed ; unless the party claiming to be injured acts diligently, in asserting a right to rescind, and honestly, by yielding up what came to it, and continues to be held and enjoyed under the contract.

The cases are many in which has been discussed the equitable rule that such contracts are not absolutely void, but only voidable ; and, notwithstanding the vice or immorality which tainted their origin, may be validated. The opinions in *Thomas v. Brownville*, Ft. K. & P. R. Co., 109 U. S. 522, 16 Am. & Eng. R. Cas. 557 ; *Twin Lick Co. v. Marbury*, 91 U. S. 587 ; *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 193, 4 Am. & Eng. R. Cas. 293 ; *Risley v. Indianapolis, B. & W. R. Co.*, 62 N. Y. 240 ; and *Barnes v. Brown*, 80 N. Y. 527—are sufficient to be referred to upon that subject, and further elaboration is quite unnecessary. The authorities relied upon by the court below at general term do not conflict with our views of this case. *Munson v. Syracuse, G. & C. R. Co.*, 103 N. Y. 58, 29 Am. & Eng. R. Cas. 377, was an action to compel the specific performance of an agreement affected by the vice that a director of the defendant corporation was a party to it, and participated in the action of the corporation in assuming the obligation. The agreement, in substance, was for the sale of certain railroad property held by the plaintiffs, and its purchase by the defendant corporation. The court, it was there held, would not aid in the enforcement of their executory contract, for it “was repugnant to the great rule of law which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested at the election of the party he represents.” This is not the present case, where the contract was executed, and its results retained and enjoyed long after the opportunity for repudiating it, because of the facts underlying the transaction. In the case of *Wardell v. Union Pac. R. Co.*, 103 U. S. 651, 1 Am. & Eng. R. Cas. 427, the agreement sought to be enforced was tainted with the same vice, in the collusion of directors. The agreement licensed certain parties to prospect and to open and operate coal mines along the line of the railroad, and leased the company's coal lands for a term of years, and it bound the company to purchase the coal mined at certain rates. A company was formed, and a majority of its stock was taken by six of the railroad company's directors, and the contract referred to was assigned to the coal company. Subsequently, officers of the railroad company seized upon the coal company's property and books, and held them ; hence the suit by plaintiffs. The facts are not stated with fullness, but presumably the seizure was at the instance of a

new management of the Union Pacific Railroad Company, who, upon discovering the fraudulent combination of the former directors to make a profit in working the company's properties, repudiated the contract, and repossessed the company of its lands. As the appellant's counsel suggests in his argument, the point of the decision condemning the transaction, and refusing to sustain the plaintiff's claim, is found in the remark of Mr. Justice FIELD, that the law will relieve against such transactions "whenever their enforcement is reasonably resisted." The case is not parallel to this case, where, concededly, no attempt has ever been made to annul the contract of lease and no offer made to return the property. The defendants had the right to elect to continue the use of this leased road, notwithstanding the causes which existed for their refusing to be bound by the contract through which it was transferred. That election was evidenced in many ways, and a cause of action accrued to the lessor company, upon the failure to make such payment as the contract of lease called for, which inured to a stockholder's benefit, when the direction of his company's affairs passed into hostile hands. It is quite a misapprehension of the matter to treat the contract of lease as in itself illegal, and therefore incapable of enforcement in the courts. The contract was not illegal in itself, but, on the contrary, was one the companies could enter into through the action of their directors with perfect propriety. What happened, as the result of the combination of persons and of directors common to each contracting company, was that that fact infected the agreement and impaired its binding force as an obligation. It did not annul or destroy it, but subjected it to the condemnation of the law. A court of equity could give relief against it, but whether it would exert its power would necessarily depend upon the circumstances of the case and the conduct of the parties. Delay and conduct inconsistent with a purpose to throw up the lease are sufficient reasons for holding the contract to have been validated, and the objections to it waived. For the reasons expressed, it was error to the trial court to have dismissed the complaint on the merits, and therefore the judgment should be reversed, and a new trial ordered, with costs to abide the event.

Contract to Construct Railroad in Which Officers of Company are Interested—Fraud.—See *Union Pacific R. Co. v. Credit Mobilier* (Mass.), 16 Am. & Eng. R. Cas. 570; *Thomas v. Brownville, F. K. & P. R. Co.*, (U. S.), 16 *Id.* 557.

Ratification of Voidable Lease.—See *State v. McMinnville & M. R. Co.* (Tenn.), 4 Am. & Eng. R. Cas. 95; note 26 *Id.* 636.

Lease by One Road of Another Having Directors in Common. See *Metro-politan El. R. Co. v. Manhattan R. Co.* (N. Y.), 15 Am. & Eng. R. Cas. 1.

CHICAGO, ROCK ISLAND & PAC. R. CO. v. UNION PAC. R. Co. *et al.*

CHICAGO, MILWAUKEE & ST. PAUL R. CO. v. UNION PAC. R. Co. *et al.*

(*United States Circuit Court, Nebraska, July 27, 1891; 47 Fed. Rep. 15.*)

Lease of Trackage Rights—Execution of Contract—Corporate Powers—Specific Performance.—The U. P. R. Co. sought a contract with the R. I. R. Co., whereby the latter company was to be given trackage rights over a bridge and a portion of the line of the former company. The proper officers of the U. P. Co., being experienced railroad men, signed and attested the contract, which was approved by the executive committee, which, under authority of the board of directors, exercised the powers of the board when it was not in session. Authority to make such a delegation of power had been given to the board by the by-laws of the company, and power to make such by-laws was given to the stockholders by the act of incorporation. At a regular meeting of the stockholders, the contract was approved by all the stockholders present, being two-thirds of the entire number, although the notice of the stockholders' meeting made no mention of the contract, and the board of directors never formally ratified the same. This contract let the R. I. Co. into joint possession of a part of the line of the U. P. Co. for a period of nine hundred and ninety-nine years, the aggregate rental being within a small fraction of that which the U. P. Co. had determined to ask when it sought the contract. The R. I. Co., in reliance upon this contract, abandoned plans and negotiations for an independent line, and spent large sums in building a road to connect with the leased line. The performance of this contract would not disable the U. P. Co. from discharging all its duties, and performing all its functions. There was no concealment or deception on the part of the officers of the R. I. Co. *Held,*

(a.) That the contract was sufficiently executed to bind the U. P. Co.

(b.) That since joint possession of the leased line would not interfere with the present use of such line by the U. P. Co., the contract was not *ultra vires* of that company.

(c.) That specific performance of such contract will be enforced by a court of equity, it not being shown that the rental is not inadequate, or that the effect of the contract may be to permit disastrous competition between the two roads.

Same—Lease of Controlled Line—Payment of Rental to Stockholders.—Where one railroad company owns substantially all the stock of another railroad company, a lease of the line of the latter company for rent to be paid to the former company, is not void for want of consideration, since it amounts merely to an agreement to pay the rent directly to the stockholders.

IN EQUITY.

T. H. Withrow, J. M. Woolworth, A. J. Poppleton, and J. W. Cary, for plaintiffs.

John F. Dillon, A. L. Williams, and John M. Thurston, for defendants.

BREWER, J.—On the 1st day of May, 1890, that which on its face purports to be a contract between five railroad companies,—to wit, the Union Pacific Railway Company, Omaha & Republican Valley Railway Company, Salina & Southwestern Railway Company, Chicago, Rock Island & Pacific Railway Company, and Chicago, Kansas & Nebraska Railway Company,—was signed and acknowledged by the respective presidents of those companies, attested by their secretaries, and received the impress of their corporate seals. While five companies joined thus in the execution of this instrument, there were really but two parties to the contract,—the Chicago, Rock Island & Pacific Railway Company and the Chicago, Kansas & Nebraska Railway Company, representing one interest and forming one party; the three other companies representing the other interest, and constituting the other party. For convenience, the first named will be hereafter called the Rock Island party, and the latter, the Pacific. The exact nature of the relations between the members of these two parties, as respects themselves, need not be stated. It is enough to say that there was on each side a unity of interest and a unity of control. Each party controlled an extensive railway system. The Rock Island embraced three main lines, each running from Chicago,—one to Council Bluffs, one to Kansas City, and the third to Denver; the Pacific,—one from Council Bluffs to Ogden, one from Council Bluffs to Denver, and another from Kansas City to Denver. The Denver line of the Rock Island passed through St. Joseph and Beatrice. By filling a gap between Council Bluffs and Beatrice, the Rock Island would secure a shorter and better Denver line. The purpose and scope of the contract was the filling of this gap; and it provided therefor by the Pacific giving to the Rock Island the use of its track from Council Bluffs to South Omaha, this track crossing the Missouri river on the Pacific's bridge; the building by the Rock Island of a road from South Omaha to Lincoln; and the giving by the Pacific of the use of its track from Lincoln to Beatrice. The Rock Island proceeded to construct a road from South Omaha to Lincoln, and about the 1st of January of this year sought to use the Pacific's tracks between Council Bluffs and South Omaha, and Lincoln and Beatrice, which use was denied by the Pacific. Thereupon this bill was filed in the district court of Douglas county, Neb., to compel specific performance of the contract. A preliminary injunction was granted by the district court, though no possession was ever in fact taken or use made of these lines by the Rock Island. Immediately thereafter the Pacific removed the case

to this court. In due course of time, the pleadings were completed, the proofs taken, and the case is now before us for final determination.

Four questions have been presented, and argued with distinguished ability. They are—*First*, was the instrument, as thus signed and attested, so authorized and executed as to become and be a contract of the corporations? *Second*, if it was so authorized and executed, was it *ultra vires*? *Third*, if not *ultra vires*, is it a contract of which a court of equity may compel specific performance? And, *fourth*, if it may, ought specific performance to be decreed?

With regard to the first question, that the contract was signed by the proper executive officers, and that the formalities of execution were sufficient, is not disputed; and, if it was one of those minor contracts which fall within the scope of the ordinary powers of chief executive officers, no question could arise as to its being a contract of the corporations. But it is not such a contract. It is one of vast moment, running for 999 years, and affecting largely the financial interests, business, and policy of the corporations. It so changes the sweep of the future that no mere executive officer, of his own volition and by virtue of the ordinary powers of his office, could commit the corporation thereto. But authority beyond that of the executive officers is not wanting. After the contract had been drafted, and on the 22d day of April, 1890, it was submitted to the executive committee of the Union Pacific Railway Company,—and of that company's relation to the contract I first speak,—and unanimously approved by all the members of that committee then present. The committee consists of seven, and six of the seven were present. Thereafter, and on the 30th day of the same month, the regular annual meeting of the stockholders was held, at which over two-thirds of the capital stock of the company was represented, to wit, 437,376 shares; and at such meeting this resolution was unanimously adopted:

“*Resolved*, that the agreement between the Union Pacific Railway Company, the Omaha & Republican Valley Railway Company, the Salina & Southwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Kansas & Nebraska Railway Company, dated May 1, 1890, (a copy of which is herewith submitted,) granting to the two last named companies trackage rights over this company's lines from Council Bluffs to Omaha, including the Omaha bridge, and the lines of this company's Omaha & Republican Valley branch, from Lincoln to Bea-

trix, Neb., and providing, further, for the use by this company of the Chicago, Kansas & Nebraska Railway Company's lines between McPherson and South Hutchinson, Kan., and the line from South Omaha to Lincoln, Neb., on the terms therein provided for, be, and is hereby, approved, and the action of the executive committee in authorizing the execution thereof is hereby ratified, approved, and confirmed."

And at the same meeting this resolution was adopted: "Voted unanimously that the stockholders hereby approve and confirm and ratify all the actions of their board of directors and the executive committee during the past year."

While the contract was never formally presented to the board of directors, and by such board authorized or approved, yet, immediately after the annual election of directors, in 1889, the board met, and, after appointing the executive committee, it "voted that, while the board of directors is not in session, the full power thereof, under the charter and by-laws of the company, be, and hereby is, conferred upon the executive committee;" and this resolution was but a repetition of those passed by the boards of directors in the 10 preceding years. This delegation of power was by virtue of article 4 of the by-laws of the company, which reads: "The board of directors shall have the whole charge and management of the property and effects of the company, and they may delegate power to the executive committee to do any and all acts which the board is authorized to do, except such acts as by law, or these by-laws, must be done by the board itself."

In the original charter of the Union Pacific Railway Company, (12 St. 489, § 1,) the power to make by-laws was granted by this sentence: "Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules, and regulations as they shall deem needful and proper, touching the disposition of the stock, property, estate, and effects of the company, not inconsistent herewith, the transfer of shares, the term of office, duties, and conduct of their officers and servants, and all matters whatsoever which may appertain to the concern of said company."

It is clear from these quotations from the records of the company that, so far as the executive committee and the stockholders could by their approval bind the corporation to this contract, they did so. Against this, it is contended that, as the board of directors did not formally act upon, either to authorize or approve the contract, the corporation never became bound, because power in respect to such matters is lodged solely in the board of directors; and, *secondly*,

that if this be not true, and the stockholders are vested with power in respect thereto, the vote of the stockholders at the annual meeting was not sufficient, because in the call for such meeting no mention was made of this proposed contract; and the minority of the stockholders, who were not present, were thus given no opportunity to consider it, and never joined in the approval. Neither of these propositions can be sustained. By the original Union Pacific act, there was created "a body corporate and politic, in deed and in law;" which corporation was "authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph," etc.; and was also "vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act, as herein set forth." By this act, therefore, was created a corporation, with all the powers incident to corporate existence. One of those incidents is that the ownership of the corporate property is vested in the stockholders, and with them rests also the absolute and ultimate power. In the Dartmouth College Case, 4 Wheat. 518, Judge STORY, speaking of an aggregate corporation, says, (page 667:) "Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members." It is true that the act provides that there shall be certain directors appointed by the government. This provision was inserted doubtless because of the fact that the government, as second mortgagee and a bountiful donor to the company, was largely interested. It is also true that subsequent legislation (13 St. 361, § 13) provides that at least one government director shall be a member of each standing committee. But there is nothing in the original act, or any subsequent legislation, giving to them either veto or controlling power; and from some of the reports which have been made in times past, by these government directors to the government, as well as from some of the developments in this case, it would seem as though they were too often regarded as merely convenient and useful ornaments. While doubtless congress could have vested either in the board of directors as such, or in these government directors, absolute and exclusive control in matters like this, yet it did not. Not only did it, as appears from the provisions heretofore quoted, give to the stockholders control over "all matters whatsoever which may appertain to the concern of said company," but also its express grant of powers to the directors is by the same section limited to the election and appointment of officers and agents, the location and construction of the road, and the matter of subscriptions. All other powers which the direct-

ors have are those which spring from the nature of their officers, or from special grants from the stockholders. In this, as in any other stock corporation, with the stockholders rests not only the ownership of the property, but the ultimate and absolute power and control. Much is said in the books about the ordinary and extraordinary powers of a corporation,—the one vested in the directors, the other in the stockholders or members. In *1 Beach, Priv. Corp.* § 73, the rule as to the latter is thus stated :

“ To the members is reserved also the right of applying to the legislature for amendments of their charter, and the power to accept or reject proposed amendments thereof, to alter the articles of association, to authorize an increase or reduction of the capital stock, to sell or lease the corporate property, or modify the terms of an existing lease, to consolidate or merge the company with other corporations; and, in general, all extraordinary or unusual powers not conferred upon the directors, expressly or by necessary implication, are reserved to the members.”

If this statement of law be correct, then this contract is one beyond the power of directors to make, and could be authorized only by the stockholders; for the making of such a contract is not among the matters expressly or by necessary implication granted by the charter to the directors. But I rest little on this distinction; for any act, although within the powers of a board of directors, when done by an executive officer, with the direction or approval of the stockholders, is binding on the corporation, although the directors have never directed or approved of it, unless by the terms of the charter exclusive power therefor is vested in the directors. Neither is there force in the other objection,—that the notice of this annual meeting did not specify these contracts. The charter, in the same section heretofore quoted from, provides for annual meetings of the stockholders, for the transaction of business, “ to be holden at such time and place, and upon such notice, as may be prescribed in the by-laws.” Notice of time and place was given as prescribed by the by-laws, and the meeting was duly held. There is no by-law requiring special mention of the subjects to be considered at such meeting. Every stockholder, therefore, takes notice of the fact that all business which may be transacted by the stockholders is open for consideration and action at such meeting; and their powers at such a meeting are as vast and complete as the competencies of the corporation. Indeed, at the time the notice was given of this annual meeting, this contract was not prepared, and could not have been specified therein; and the fact that other matters were specified in the

notice in no manner limited the powers of the stockholders at such meeting. *State v. Bonnell*, 35 Ohio St. 10; *Warner v. Mower*, 11 Vt. 385; 1 *Beach, Priv. Corp.* § 279; *Sampson v. Steam Mill Corp.*, 36 Me. 78; 1 *Mor. Priv. Corp.* § 482; *Cook, Stocks*, § 595.

Summing up this question: The instrument was signed and attested by the proper officers. It was approved by the executive committee, which executive committee was granted *ad interim* by the board of directors all the powers of that board. Authority to make such a delegation of power was given to the board by the by-laws. Power to make such by-laws was bestowed by the act of incorporation upon the stockholders. At the regular meeting the contract was approved by all the stockholders present, being two-thirds of the entire number. Under these circumstances, if the contract was one which the corporation could make, it was fully authorized and duly executed, and binding.

So I pass to the second question: Is the contract one which the corporation could make, or is it *ultra vires*? The doctrine of *ultra vires* has been thoroughly sifted within the last 30 years,—its extent and limitations clearly defined. Thomas *v. Railroad Co.*, 101 U. S. 71; Branch *v. Jesup*, 106 U. S. 468, 9 Am. & Eng. R. Cas. 558; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 24 Am. & Eng. R. Cas. 58; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 39 Am. & Eng. R. Cas. 176; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 45 Am. & Eng. R. Cas. 607. Two propositions are settled. One is that a contract by which a corporation disables itself from performing the functions and duties undertaken and imposed by its charter is, unless the state which created it consents, *ultra vires*. A charter not only grants rights,—it also imposes duties. An acceptance of those rights is an assumption of those duties. As it is a contract which binds the state not to interfere with those rights, so, likewise, it is one which binds the corporation not to abandon the discharge of those duties. It is not like a deed or patent, which vests in the grantee or patentee, not only title, but full power of alienation; but it is more,—it is a contract whose obligations neither party, state or corporation, can, without the consent of the other, abandon. The other is that the powers of a corporation are such, and such only, as its charter confers; and an act beyond the measure of those powers, as either expressly stated or fairly implied, is *ultra vires*. A corporation has no natural or inherent rights or capacities. Created by the state, it has such powers as the state has seen fit to give it,—“only this, and nothing

Contract not
ultra vires.

more." And so, when it assumes to do that which it has not been empowered by the state to do, its assumption of power is vain; the act is a nullity; the contract is *ultra vires*. These two propositions embrace the whole doctrine of *ultra vires*. They are its alpha and omega. To determine the applicability of these propositions to the contract, we must notice its features a little more in detail. It is too long to quote in full, but the first section of the first article is its kernel. It is as follows:

"The Pacific Company hereby lets the Rock Island Company into the full, equal, and joint possession and use of its main and passing tracks, now located and established, or which may be hereafter located and established, between the terminus of such tracks in the city of Council Bluffs, in the state of Iowa, and a line drawn at a right angle across said tracks within one and one-half ($1\frac{1}{2}$) miles southerly from the present passenger station of South Omaha, in the state of Nebraska, including the bridge on which said tracks extend across the Missouri river, between said cities of Council Bluffs and Omaha; connections with Union Depot tracks in Omaha, the side or spur track leading from the main tracks to the lower grade of the Pacific Company's sidings and spur tracks in Omaha, and such extensions thereof as may be hereafter made; side tracks in Omaha on which to receive from and deliver to the Rock Island Company freight that may be handled through the warehouses, or switched by the Pacific Company; the connections with the Union Stock Yards tracks in South Omaha, and conveniently located grounds in South Omaha, on which the Rock Island Company may construct, maintain, and exclusively use a track or tracks, aggregating three thousand (3,000) feet in length, for the storage of cars and other purposes,—for the term of nine hundred and ninety-nine (999) years, commencing on the first day of May in the current year; for which possession and use the Rock Island Company covenants, promises, and agrees to pay to the order of the said Pacific Company, monthly, during the continuance of said term, the sum of three thousand seven hundred and fifty (3,750) dollars, with the proportion of the costs and expenses actually incurred during the month for which such payment is made, in maintaining, repairing, and supplying with water that portion of such main tracks jointly used and situated east of the east end of said bridge, and in the city of Council Bluffs, and in paying taxes and assessments legally laid and levied thereon, which proportion shall be to the aggregate of the amount so paid as the proportion of the number of wheels per mile operated during the same month by the Rock Island Company over said

tracks, or any part thereof, shall be to the whole number of wheels operated per mile over the same tracks during the same period; which sum the Pacific Company agrees to receive as full compensation for such possession and use."

It is said by the defendant that this is a lease; the language of demise is used; and a lease was denounced in 101 U. S., 118 U. S., *supra*, as *ultra vires*; to which it is replied that in the resolution quoted above, passed by the stockholders, approving this agreement, it was called "one granting trackage rights." But neither the form of expression on the one hand, nor the name on the other, is conclusive. We must see what rights and privileges were in fact granted, what burdens and obligations assumed, in order to determine whether that which was attempted to be done was beyond the competency of the corporation. The contention of the defendant is substantially threefold: *First*, that the contract, if put in force, will at once disable the Pacific from performing the duties imposed upon it by its charter; *second*, that if it will not at once have that effect, it will before the termination of the 999 years of its term; and, *third*, that the charter, neither in terms nor by implication, gives power to make such a contract.

The question as to whether a contract is *ultra vires* or not may arise in a controversy between the state and a corporation, or between the corporation and the party with whom it has assumed to contract; and it may well be that different rules of construction apply to the two cases: All grants, even grants of corporate franchises, are construed strongly in favor of the government, and against the grantee. So when the state challenges the action of one of its corporate creations, it may insist on clear warrant for such action. It may say: "Point to the letter of your authority. I abide by my contract, and protect you in the rights and franchises I have given. Abide by your contract, and assume to do no act in disregard of the duties I have imposed, or beyond the authority I have conferred." The rule of strict construction exists in such a case. But a milder rule applies when a corporation seeks to repudiate a contract into which it has formally entered. It is not seemly for a corporation, any more than for an individual, to make a contract and then break it; to abide by it so long as it is advantageous, and repudiate it when it becomes onerous. The courts may well say to such corporation: "As you have called it a contract, we will do the same. As you have enjoyed the benefits when it was beneficial, you must bear the burden when it becomes onerous, unless it clearly appears that that which you have assumed to do is beyond your powers." In *Railway Co. v.*

McCarthy, 96 U. S. 267, the supreme court said: "When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."

In other words, courts should be clearly satisfied that a contract is *ultra vires* before, at the instance of a corporation, they release it from the obligations which it has voluntarily assumed. With this rule of construction in mind, I pass to the consideration of the three contentions of the defendants. It clearly will not operate at present to disable the Pacific from discharging its duties. While the Rock Island is let into possession and use, the Pacific is not put out of possession and use. There is no surrender of the exclusive use of any portion of the Pacific's line. It remains in the undisturbed possession of every mile of its track; can operate all its trains, and discharge all the duties which it owes to the government or the public. A different question would arise if it had attempted by this instrument to dispose of the full possession of the same length of its track. Its obligation to the government is not to hold all its tracks or property beyond the use or touch of any corporation. It goes no further than to retain such possession and use as will enable it to run all its trains, and carry all its passengers and freight. No monopoly of isolation from other currents of business is essential to this. It may do all the business which is offered, and still have a surplus use of its tracks. Can it be that its obligation to the government or the public compels it to let that surplus use lie idle? It is rather for, than against, the interest of the government which creates it; and which is itself interested, as second mortgagee and the holder of a large claim against it, that it coin all such surplus use into money. Surely, if this be so, it does not come within the scope of the first proposition. I shall not attempt to refer to the testimony in detail. Indeed, I think it is conceded that, if this contract was put to-day in full operation, the Pacific would have ample accommodations for all its business. In this respect the case is very different from those cited from the supreme court. In them there was a full surrender of possession. As said by Mr. Justice MILLER in the Thomas Case: "The provision for the complete possession, control, and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the

road and in the exercise of the franchises of the company is reserved."

I conclude, therefore, that this contract is not objectionable, as now disabling the Pacific from discharging the duties imposed by its charter. But the term of this contract is 999 years; and it is strongly insisted that long before that time has been reached the growing business of the Pacific will demand the entire possession and use of all its tracks and facilities, and that the length of the term makes that void which might have been valid if for a few years. To this, in my judgment, there are two satisfactory replies. No man can foresee the future. While we have a right to believe that the country will grow in population and business, and have a right to expect that the business of this particular corporation will increase, yet we also know that, with increased volume of business, as a rule come increased facilities and means for transacting that business. It is not to be expected that the business of any railroad will increase in the next 20 years in the same ratio as the last. New roads are constantly being built, other channels of transportation will arise, and business so increasing will be divided among more. Who, indeed can say that the railroad itself will be the common means of transportation 20 years hence? May not electric lines, on differently constructed tracks, supersede the railroads, as the railroad has superseded the canal? Into that field of speculation who may safely enter, and what decrees may be founded thereon?

But again, the powers of a court of equity do not end with a day. If the changed condition of affairs 20 years hence shall make the full use of its tracks and other facilities necessary to the Pacific, for the transaction of its business and the discharge of its duties to the government and the public, the powers of a court of equity are equal to the emergency, and can relieve it from the obligations of this contract; for the obligation of a corporation to not disable itself from the discharge of its duties is a continuing one, and all contracts which it makes endure only so long as their continuance does not create such a disability. This matter has embarrassed me a good deal, but I have come to the conclusion that sufficient to the day is the evil thereof, and strong enough and adequate for to-morrow are the powers of a court of equity. It is at least clear that the government is not concluded by any decree between these parties; and whenever its rights are disturbed it may interfere and compel, as against everybody, the full discharge of its duties by the Pacific. Neither can it be said that this contract is clearly beyond the powers granted to the Pacific. It is obvious to all that the exi-

gencies of public interests have enlarged the area of the incidental and implied powers of a corporation. Witness the many things which railroad companies to-day freely and without question engage in, in furtherance of their transportation business, which are strictly not part of such business. Their depots are often eating-houses and hotels; dining and sleeping cars are on many trains; bath-rooms and libraries on some; hospitals are furnished; insurance to employes is not uncommon; yet who can say that these things are a part of the laying out, construction, or operation of a railroad, strictly speaking; yet it would startle the common sense of the business world if the contracts of the railroad companies for the carrying out these incidental matters were by the courts declared *ultra vires*. In the case at bar, as we have seen, the contract is not one for the dispossession of the Pacific Company from the use of its tracks or other facilities. It is not one disabling it from discharging its duties. It is simply one to coin into money, for its benefit, the surplus use of a part of its property. Can it be that such a contract is beyond the powers implied by the grant? Concede that, under the power to lay out, construct, and operate a railroad, it is not authorized to build tracks for the purposes of sale or lease, but when discharging its duties it builds tracks for its own use, and uses them, if all the use it can make is limited, and there be a large amount of surplus use, upon what reason can it be adjudged that that surplus use must necessarily lie idle? It is a thing of value. It may be, as it is done by this contract, coined into money. What right or interest of the government or public is prejudiced thereby? If a railroad company builds a depot which is larger than its present needs require, may it not rent one room, and receive profit therefrom? or must it, because it is not authorized to build buildings for rent, let that room remain vacant until the increase of its business requires its use? The Pacific Company may not build tracks for the purpose of leasing them, but it must have at least one track for the passage of its own trains. If its trains do not fully use that track, as in this case they do not, it has a surplus of use, which is of value, and which it may make profit out of in any manner not inconsistent with its duties to the public and its obligations to the government. I think it may be laid down as a general proposition that a corporation which, in its discharge of the duties imposed by its charter, acquires property which it must have for its own uses, may, if there be a surplus use of such property, make a contract for the disposition of such surplus use in any manner not inconsistent with the purposes of its creation. So I conclude that neither of the three objections is well taken, and hold that the contract is not *ultra vires*.

So far as the Omaha & Republican Valley Railway Company is concerned, it is objected that the contract is invalid, because it is without consideration; the contract providing that the Rock Island shall pay to the Union Pacific Railway Company the rental for the use of the Omaha & Republican Valley Railway Company's line. There is little force in this. The Union Pacific Company owns substantially all the stock of the Omaha & Republican Valley Railway Company, and a contract by a company that the rental for the partial use of its property shall be paid directly to the stockholders, instead of to the company, surely cannot be declared beyond the power of the corporation. This is all that need be said in respect to the relation of the Omaha & Republican Valley Railway Company to this contract.

Third, is this contract one of which a court of equity may compel specific performance? Fortunately, a recent decision of the supreme court, in the case of *Joy v. St. Louis*, 138 U. S. 1, 45 Am. & Eng. R. Cas. 655, relieves from any embarrassment. That case was originally heard before me while I was circuit judge; and after a careful examination, and though in the face of seemingly adverse precedents, I decreed specific performance of a contract for the joint use of track. That decree was affirmed by the unanimous opinion of the supreme court. All the objections which are here made were presented there, and overruled, and the necessity of the interposition of a court of equity in cases of this kind clearly shown by Mr. Justice BLATCHFORD, in the opinion of the court. The spirit of that decision is expressed in this quotation: "Railroads are common carriers, and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation."

I know, to one who is only familiar with the narrow limits and the strict lines within and along which courts of law proceed, the act of a court of equity in taking possession of a contract running for 999 years, and decreeing its specific performance through all those years, seems a strange exercise of power; but I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand. And, in passing, I may be permitted to

Equity may
compel specific
performance.

observe that in this respect the distinguished jurist who appears for the defendants in this case taught me my lessons; who, on the bench of the circuit court of this circuit, not only took possession of and managed great railroad companies by receivers, but built hundreds of miles of railroad, and created millions of dollars of obligations against those roads. I then watched those proceedings with something of amazement, but the more I studied the more I admired, till, thus having studied at the feet of Gamaliel, I learned to believe that the powers and processes of a court of equity are equal to any and every emergency. They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation, and compel it to perform its contracts of every nature, and do justice to every individual.

May I be permitted another suggestion? The railroad world to-day is in unrest. Millions of capital have gone into railroad enterprises, seeking profit therefrom. Legislators vie with legislators in efforts to reduce rates. To maintain such rates as will secure just compensation for the capital invested, railroad companies enter into associations and form traffic contracts. But such contracts seem but ropes of sand, and such associations but gilded figure-heads, and not controlling forces. And back of all is a wide and growing demand that the government take possession of all the railroads, and itself become the great common carrier. Is it not possible that the powers of a court of equity may yet be found adequate to the situation? that such courts may yet lay strong hands upon these railroad corporations and, by compelling performance of contracts, secure stability, uniformity, and justice to all, and thus quiet the clamor, and avoid any necessity of governmental possession and management?

But this is outside of the question before us. Returning to the case: Counsel contend that it is distinguishable from that of *Joy v. St. Louis*, in that there was a great public interest to be protected, which justified, as was mentioned in the opinion, the interposition of a court of equity. I think no such distinction exists. There is in this case a public interest as significant and deserving of protection. The testimony discloses that before this contract was entered into the Rock Island had determined to build a bridge across the Missouri river at Omaha, and fill the gap between Council Bluffs and Beatrice by its own line. In conjunction with the Chicago, Milwaukee & St. Paul Railway Company, it had obtained from congress a charter for the building of the bridge;

and negotiations were pending to secure the capital, some two or three millions of dollars, with which to do the work. At that time the officers of the Pacific sought the officers of the Rock Island and the St. Paul, and prevented the building of the new bridge by means of this contract. If this contract had not been made, or it should not now be enforced, two or three millions, at least, of additional capital would be put into railroad and bridge construction; and such an expenditure of money places an additional burden upon the public. Every unnecessary mile of railroad track or bridge that is built adds to the cost of transportation, and surely the public is interested in seeing that that cost be as light as possible. A very serious economic and political question is whether this free country has not made a mistake in giving too large liberty of railroad construction. Take a single illustration: In the state of Colorado, between Pueblo and Denver, are three independent lines of road, with separate and distinct tracks and rights of way. To say nothing of the waste of lands and the injury to farms, the costs of these three lines of road, I am assured, is much more than double that of a single right of way with two tracks; and such single right of way would be adequate for all the business that the three roads have done, or are likely to do, for many years. The public which uses these roads bears the burden of this extra cost. Would not its interests have been promoted if by contract or law all these railroads could have been compelled to unite in a single line? So, here, if the public can prevent an increase of railroad property by the sum of two or three millions of dollars, it saves to itself the burden which that additional expense would cast upon it. Further, a new line running into Omaha cuts up and destroys unnecessarily a large amount of property. So in this, as in the case of Joy v. St. Louis, there is a public interest at stake which justifies the intervention of a court of equity. This is a case in which, and a contract of which, a court of equity may decree specific performance.

I pass to a consideration of the last question: Ought this contract to be specifically enforced? Of course, it is familiar law that courts of equity do not always decree specific performance of even unquestionably valid contracts. Insufficiency of consideration, want of fairness, or any special hardship resulting therefrom, is sufficient to prevent a decree of specific performance, and send the party to his action at law for damages. Pom. Spec. Perf. § 185; Fry, Spec. Perf. §§ 181, 193, 203. These defenses are interposed here: It is insisted that the rental for the use of the bridge, and the tracks between

Contract is such that it ought to be enforced.

Council Bluffs and South Omaha, to-wit, \$45,000, is grossly inadequate. Contemporaneous with this, another contract of similar import was executed with the Chicago, Milwaukee & St. Paul Railway Company, by which it also was to pay a like rental; so that the rentals secured by these two contracts, for the use of the same property, amount to \$90,000. A volume of testimony was taken to show the value of the Pacific's property for which this rental was to be paid. Four or five engineers of ability, and real estate men of experience, testified fully in respect to this matter. Their estimates were very divergent, varying from three to seven millions. I shall not attempt in this opinion to review this testimony, or seek to determine which of these estimates is most reliable. Obviously, the estimate of Mr. Smead, the chief engineer of the Pacific, is too high, in that it includes property not covered by the lease. Probably the real value lies somewhere between the respective figures, and nearer three than seven millions. If the value be seven millions, \$90,000 rental is only about $1\frac{1}{3}$ per cent.; and, if this were the rental for the full and exclusive possession, it would obviously be too low, but there is only a partial possession and a partial use. This rent is so much in excess of that which the Pacific realizes from its own use of the property. Not only that, by section 7 of article 3 of the contract, the Pacific reserves to itself the right to let other companies into the like possession and use of this property, without sharing with these lessees the rentals thus obtained. On the other hand, if the value of the property is only \$3,000,000, the rental is 3 per cent., and that for only this partial use. But, beyond this Omaha property, the contract provides for the use by each party of portions of the other's tracks; and the benefits which flow to the Pacific, from its acquisition of parts of the Rock Island's tracks elsewhere in the system, are worthy of notice in determining the sufficiency of the consideration. There are other benefits, also, of a pecuniary nature, the amount of which may not perhaps be easily estimated, which will inure to the Pacific from the pouring of this volume of business of the Rock Island and St. Paul roads over its tracks, rather than over an independent and separate line.

But I place more reliance upon this further matter: As heretofore stated, the contract was sought by the Pacific. The then executive officers of that company, distinguished and competent railroad gentlemen, of long experience in connection with the property, in their consultations as to the price to be demanded, and before any conference with the officers of the Rock Island and the St. Paul, fixed \$50,000 as the sum to be demanded, and \$45,000 as that to be accepted.

Now, when gentlemen so competent to determine such a matter, so interested in securing the best possible terms for the Pacific, without suggestion from the other side, named \$50,000 as the rental to be asked, I think it would be strange for a court to hold that a rental of \$45,000 was grossly inadequate. This is not a case in which the defendant has been led into a contract, or its terms fixed by inexperienced or incompetent men; but it sought the contract, named its price, and received nine-tenths of the consideration which it proposed to take.

It is further objected that the Pacific does a large local business between Council Bluffs and South Omaha, from which it makes much profit; and that under this contract the Rock Island may itself put on local trains, and, by reducing the fares, practically cut off this source of revenue from the Pacific; whereas, if it built a separate bridge and a separate line, the amount of the cost would be so great that it would be compelled to keep up rates. My observation has taught me that the cutting of rates generally springs from quarrels between competing roads, and is little, if at all, affected by the cost of the property; and if the Rock Island and St. Paul were now forced to build a new bridge, and establish an independent line, there would be just as much likelihood of the cutting of rates. Aside from the existence of any quarrel, self interest will prompt the Rock Island and St. Paul to maintain any rate which is just and reasonable. More than that, the Pacific has no right to expect. But another safeguard is this: Every contract implies good faith in the contracting parties, no matter what may be the mere language of the instrument; and if, after having been let into possession, the Rock Island should in any way abuse the privileges given by this lease, the courts are open to furnish protection, even if, to secure it, it be necessary to cancel the lease.

But there are considerations on the other side which are worthy of mention, and which make specific performance right. While no estoppel runs against an *ultra vires* contract, yet it is fair always to consider the situation of the plaintiff if specific performance be denied. The Rock Island has constructed a line from Lincoln to Omaha, and had expended a million and a half of money in reliance upon this contract. It and the St. Paul abandoned their scheme of building a new bridge, and creating a new and independent line into and through Omaha. If now specific performance is refused, what becomes of that investment? Must it lie idle until a year or so have passed, in which a new bridge and a line into and through Omaha can be completed? and who can tell

whether, in the changed financial condition, these companies could secure the money with which to build the bridge and construct the line? Suppose the Rock Island was refused specific performance, and relegated to an action for damages, of what avail would such action be? Long would be the delay in prosecuting it to judgment. What would be the measure of damages? And, if a large sum were recovered, is there any certainty, in view of the heavily mortgaged condition of the Pacific, that the judgment could be collected? I think I need continue this discussion no further. I have given this case long and careful consideration. Summing the whole matter up: The defendant sought this contract. Its executive officers were gentlemen of long experience with the property, and distinguished ability as railroad officials. There was no concealment or deception, no fraud or unfairness, on the part of the officers of the plaintiff. There was no opportunity for any; the officers of the defendant company fully understood the situation. To this contract, not only the executive officers, but also the great body of the stockholders, of the Pacific gave their approval. The rental finally agreed upon was within a small fraction of that which the defendant had determined to ask. Relying on this contract, the plaintiff abandoned plans and negotiations for an independent line, and has expended over a million of dollars in building a road from Omaha to Lincoln. It will be grievously hurt if performance is not now decreed. Performance will not disable the Pacific from discharging all its duties and performing all its functions. If the time shall ever come in which performance shall tend to have that effect, the government, at least—the party having the right to complain—can interfere and put an end to the plaintiff's possession and use. The contract is for the interest of the government as second mortgagee, as coining surplus use of tracks into money. It is for the interest of the public in preventing the destruction of valuable property, and the cutting up of a large city by new tracks and right of way, and in avoiding an unnecessary investment of large sums of money in railroad building, and thus increasing the railroad burden. It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action. The decree will go for the plaintiff as prayed for. The same

considerations require that a like decree be entered in the case of the Chicago, Milwaukee & St. Paul Railway Company against these defendants.

Contract for Use of Tracks—Assignment of Rights Under Contract.—A contract between the C., R. I. & P. R. Co. and defendant company, giving the former the right to use the latter's tracks, depots, etc., stipulated that the contract should be binding on the lessees, assigns, grantees, and successors of each company during the continuance of their franchises, and provided that the former company could assign its interest in the contract only by sale, lease, or consolidation of its own property. *Held*, that an assignment or conveyance by the C., R. I. & P. R. Co. of its interest in the contract by virtue of leases, sales, and consolidation of its property, carried with it all the rights of said company under the contract. *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 46 Fed. Rep. 145.

Construction of Contract for Use of Tracks and Terminals.—Complainant's assignor, being engaged in building a railroad from the east, with the intention of bringing it to Colorado Springs, or, possibly, direct to Denver, entered into a contract with defendant company for the use of its tracks, depots, etc., which provided that complainant's assignor should have the full, equal, joint, and perpetual possession and use of all defendant's tracks, buildings, stations, sidings, and switchings on and along its line of railway "between and including Denver" and South Pueblo, meaning and intending to include all its railway and appurtenant property "between and at the points aforesaid." *Held*, that the contract gives complainant the right to use the depot grounds and property of defendant in Denver for the handling of its freight and passenger business, without respect to the road over which it may haul its cars. *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 46 Fed. Rep. 145.

The contract between the Chicago, Rock Island & Colorado Railway Company and the Denver & Rio Grande Railroad Company for the joint use of the railway of the latter company between and including Denver and Pueblo construed, and *held*—*First*, that the Chicago company has not the right to use the Denver terminals for the cars it operates and the business it does over the Union Pacific Railway; *second*, that the Chicago company has the right to do its own switching and handle its own freights in the joint yards, but its switching engines and laborers must work under the orders, superintendence, and direction of a superintendent or other officer appointed by the Denver & Rio Grande Railroad Company, and invested with the sole and absolute superintendence and control of the work in the joint yards; *third*, that, under the clause of the contract excluding from its operation the "shops at Burnham," the shop grounds appurtenant to the shops are excluded. *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 45 Fed. Rep. 304.

Specific Performance of Contracts with Railroad Companies.—See *Conger v. N. Y. West Shore & B. R. Co.* (N. Y.), 43 Am. & Eng. R. Cas. 643, note 645; *Rector, etc., v. Paterson E. R. Co.* (N. J.), 43 *Id.* 654; *Appeal of Ballou* (Pa.), 43 *Id.* 709; *Joy v. St. Louis* (U. S.), 45 *Id.* 655; *Chicago, M. & St. P. R. Co. v. Durant* (Minn.), 46 *Id.* 488.

Authority of Officers of Railroad Company to Execute Lease of Line.—See *Beveridge v. N. Y. El. R. Co.* (N. Y.), 39 Am. & Eng. R. Cas. 199; *Metro-politan El. R. Co. v. Manhattan R. Co.* (N. Y.), 15 *Id.* 1.

MANCHESTER & LAWRENCE R. CO.

v.

CONCORD R. CO.

(New Hampshire Supreme Court, March 14, 1890.)

Lease—Ultra Vires Contract—Who May Allege Invalidity.—Under the equitable rule that neither party to a transaction *ultra vires* simply, will be heard to allege its invalidity while retaining its fruits, it is held that the defendant railroad company which has, under a contract, used the roadbed, rolling stock, and equipments of the plaintiff company, cannot set up as a defense to the plaintiff's bill for an accounting, and a return of the property, that the contract was *ultra vires*.

Contract Between Competing Railroads—Public Policy.—All contracts between rival railroad corporations, which prevent competition, are not necessarily contrary to public policy, and therefore illegal in themselves. In such cases the illegality depends upon the circumstances. When such contracts prevent a healthy competition, and furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial and in accordance with sound principles of public policy.

Same—Statute Forbidding the Consolidation of Competing Lines.—A contract whereby the roadbed, rolling stock, and equipments of one competing line of railroad is to be operated and controlled by another competing line, is made illegal by Act N. H., July 5, 1867, which forbids the consolidation of competing railroads.

Same—Executed Contract—Illegality as a Defense to Bill for Accounting.—Where an illegal contract of consolidation between railroad companies having competing lines, has been executed, and defendant has derived all the benefits arising from the contract, its illegality is no defense to a bill in equity for an accounting, and a return of the consideration to the plaintiff company, whose property and equipments pass to the defendant under such contract.

Bill for Discovery—Exposure to Penalty.—Where a prosecution for a penalty is barred by the statute of limitations, a party cannot refuse to discover matters connected with the transaction, on the ground that such evidence will induce an exposure to the penalty.

DEMURRER to bill in equity.

C. H. Burns, J. F. Briggs, O. E. Branch, W. S. Ladd, and Fletcher Ladd, for plaintiff.

J. W. Fellows, J. H. Benton, Jr., and Chase & Streeter, for defendant.

BLODGETT, J.—This proceeding is a bill in equity for a discovery and an accounting of the defendant's dealings with the plaintiff's railroad properties from December 1, 1856, to July 1, 1887, under various contracts and leases; for the delivery of certain books, records, and papers alleged to belong to the plaintiff; for the return to

Case stated.

it of rolling stock and equipments of the appraised value of \$147,592, which went into the defendant's possession at the time it took the plaintiff's road, and which it still retains; and for the determination and adjustment of the respective rights of the parties in and to certain lands, depots, and tracks, situate in Manchester. In bar of the plaintiff's right to a recovery the defendant files three special pleas, and, as to the matters in the bill not covered by the pleas, it demurs. The plaintiff demurs to the pleas.

The first plea avers that the contracts between the parties, under which the defendant went into and retained the possession and management of the plaintiff's road for more than 30 years, were wholly beyond the corporate power of either party to make or to ratify and that therefore the defendant should be hence dismissed with its costs and charges. In other words, not denying that it has received the full benefit of the performance of the contract by the plaintiff, the defendant says that it should in equity be permitted to retain the benefit and property so acquired, and be dismissed with costs, because it was not empowered by its charter to perform what it promised the plaintiff in return. The demurrer to this plea is sustained. The defense set up is so repugnant to the natural sense of justice, so contrary to good faith and fair dealing, and so opposed to the weight of modern authority, that it need only be said that, in equity at least, neither party to a transaction *ultra vires* simply, will be heard to allege its invalidity while retaining its fruits. However the contractual power of the defendant may be limited under its charter, there is no limitation of its power to make restitution to the other party whose money or property it has obtained through an unauthorized contract, nor as a corporation is it exempted from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial.

The second plea avers, and the demurrer of course admits that at the time of the making of the contracts between the parties, and of the dealings thereunder, their respective roads "were rival and competing railroads, by the competition of which the prices of transportation thereon were, and, but for said supposed contracts, dealings, transactions, operations, and business, would have continued to be materially reduced, and said alleged contracts, dealings, transactions, and business were made and had for the purpose of destroying and preventing such competition, and did destroy and prevent it." It will be noticed that there is no averment in the plea that

Defendant
cannot plead
ultra vires.

Validity of
contract be-
tween com-
peting lines.

the purpose of the contracts was to raise the prices of transportation above a reasonable standard, or that they did have this effect, or that the public were prejudiced by their operation in any manner; and the naked question presented then is, whether all contracts between rival railway corporations which prevent competition are necessarily contrary to public policy, and therefore *mala prohibita* and illegal in themselves. To state this question is to answer it in the negative, because it is obvious that the illegality depends upon circumstances. While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to the public and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial, and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained that the public is benefited by unrestricted competition between railroads has been so emphatically disproved by the results which have generally followed its adoption in practice that the hope of any permanent relief from excessive rates through the competition of a parallel or rival road may, as a rule, be justly characterized as illusory and falacious. Upon authority also, arrangements and contracts between competing railroads, by which unrestrained competition is prevented, do not contravene public policy. *Hare v. London & W. N. R. Co.*, 2 Johns. & H. 80, is directly in point. In that case a bill in chancery had been by a stockholder in the defendant company to annul an agreement between two railroad companies to divide the profits of the traffic in fixed proportions; and it was admitted there, as it is here, that the purpose of the agreement was to prevent competition. In dismissing the bill Vice-Chancellor WOOD said, (page 103:) "With regard to the argument against the validity of the agreement, I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. * * * It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard." So, also, in *1 Redf. R. R.* § 146, par. 2, it is said: "There is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition."

And Mr. Morawetz says, in his admirable treatise on Corporations: "Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin; and, so far as agreements among companies are designed to effect this result, their purpose is not injurious to the public, or illegal. Moreover, such agreements are positively beneficial to the public, so far as they prevent the fluctuation of rates and unjust discriminations among shippers, which invariably attend the unrestricted competition of rival companies. It is therefore impossible to support the proposition that all agreements among railroad companies which restrict competition are condemned by law. Some such agreements may be contrary to public policy, and unlawful; but if an agreement of this character is a reasonable business arrangement to protect the shareholders and creditors of the companies from loss, and does not cause unreasonably high charges or violate any duty which the companies owe to the public, it should be sustained and enforced by the courts." *Mor. Corp.* (2d Ed.) § 1131. In the same section, in speaking of contracts in restraint of trade, (to which many of the authorities and much of the argument for the defendant relate.) he says: "Even if there were such a rule, as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies, for railroad companies are prohibited by law to charge more than reasonable rates. It should be observed also that competition among railroad companies has not the same safeguards as competition in trade. Persons will ordinarily do business only when they think they see a fair chance of profit; and if press of competition renders a particular trade unprofitable, those engaged in that trade will suspend or reduce their operations, and apply their capital and labor to other uses, until a reasonable margin of profit has been reached. But the capital invested in the construction of a railroad cannot be withdrawn when competition renders the operation of the road unprofitable. A railroad is of no use except for railroad purposes, and if the operation of the road were stopped the capital invested in its construction would be wholly lost. Hence it is for the interest of a railroad company to operate its road, though the earnings are barely sufficient to pay the operating ex-

penses. The ownership of the road may pass from the shareholders to the bondholders, and be of no benefit to the latter; but the struggle for traffic will continue so long as the means of paying operating expenses can be raised. Unrestricted competition will thus render the competitive traffic wholly unremunerative, and will cause the ultimate bankruptcy of the companies unless the portion of their traffic which is not the subject of competition can be made to bear the entire burden of the interest and fixed charges." The application of these principles to the plea under consideration is patent and decisive. The geographical location and relative resources of the two roads were such as to render it obvious that the plaintiff could not reasonably hope to successfully compete with its more powerful rival. The alternatives presented, it may safely be assumed, were combination or ruinous competition. It accepted the former; and as the combination did not, so far as appears by the pleadings, raise the rate of transportation above the standard of fair compensation, or violate any duty that is owing to the public from roads which are non-competing, there is nothing averred in the plea which bars the right of the plaintiff to an accounting with the defendant. Numerous cases have been cited in behalf of the defendant in support of its proposition that the combination between the parties must be regarded as void at common law because against public policy. For want of time it is quite impossible to go through and comment upon these cases in detail, as has been done in the last brief for the plaintiff; but it is sufficient to say in general terms, as is there said, that they are cases of contract in restraint of mercantile business: or cases of contract which attempt to derogate from the right of eminent domain inherent in the state; or cases where contracts between railroad companies were held contrary to public policy because one of the parties attempted to bind itself not to perform duties incident to the legal character of common carriers or public servants; or cases where contracts between railroad companies were held contrary to public policy because one of the parties agreed not to build or to cease to operate a road which it was chartered to build or operate; or cases where contracts between railroad companies have been held illegal merely on the ground that they were *ultra vires*,—in short, they do not establish a rule which fairly includes a case like the one at bar. The demurrer to the second plea is sustained.

The averment in the third plea is, "that during all the time from said December 1, 1856, until July 1, 1887, the roads of the plaintiff and defendant each constituted a part of the different lines of route for public travel and transportation be-

tween cities and towns within and without this state, forming rival and competing lines of route between such points." This plea is understood to be based upon the statute of July 5, 1867, entitled "An act to prevent railroad monopolies," and providing, among other things, that two or more railroad corporations chartered by the legislature of this state, constituting the whole or parts of different lines of route for public travel and transportation between any two cities or towns, or between any city and town, either within or without this state, forming rival and competing lines of route between such points, shall not be allowed to consolidate such roads or lines; and neither of said lines, or any road or roads composing the same, shall be run or operated by any such rival and competing line, or any road or roads, portion thereof, under any business contract, lease, or other arrangement, but each and every railroad corporation so situated shall be run, managed, and operated separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition, unless such lease, contract, or arrangement be first authorized by the legislature, and approved by the governor and council." When this act was passed, the contract in force between the parties, and under which the roads were then being operated, was that of December 27, 1860; and the claim of the defendant is that whatever may be said with reference to the prior contracts and to the operation of the roads under them up to the time of the passage of the act of 1867, that act rendered the further execution of the contract of December 27th illegal and prohibited it. This point is well taken. Whatever may now be the sentiment of New Hampshire in respect to the operation of railroads since the results attendant upon consolidation have been sufficiently demonstrated to remove any intelligent fear of extortion in rates or deterioration of service, there can be no doubt that in 1867 its sentiment was in favor of independent and competing lines, and that the purpose of the legislature was to make the act in question an effective instrumentality against the consolidation of competing roads through contracts or arrangements between them, by means of which competition is removed. *Currier v. Concord R. Corp.*, 48 N. H. 325; *Fisher v. Concord R. Co.*, 50 N. H. 208. The act, of course, had no *ex post facto* application, and was therefore of no effect as to anything which had already been done by the parties under the contract of December 27th, but it did prohibit them from further operating the roads

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under that contract, (unreported opinion of BELLOWS, J., in *Currier v. Railroad Co.*, December Law Term, 1871,) and so far rendered it void as to deprive either party of the right of recovering expressly for its subsequent breach. Nevertheless, we do not think the defendant is entitled to retain the money or other property so acquired, and for which it has rendered no corresponding equivalent to the plaintiff in return, but, on the contrary, we are of opinion that it is its duty to make equitable compensation and restitution, and that the duty may be enforced in this proceeding. It is true that, in general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity will not interpose to grant relief; but this is so only when the parties stand upon equal footing, for the doctrine everywhere running through the books is that relief will be granted when both parties are *in delicto* provided they do not stand *in pari delicto*. See Story, Eq. Jur. (12th Ed.) §§ 298, 300. These parties do not so stand, for, however guilty the plaintiff may have been in permitting or in concurring in the illegal operation of its road by the defendant after the act of July 5th, its guilt must fairly be regarded as far less in degree than that of its associate in the offense. And that the legislature regarded the defendant as the greater offender is made entirely plain by the fact that the only penalty prescribed by the act of July 5th for the violation of its provisions is imposed upon the road which operates another road, and not upon the road which is operated; for the reading of the second section is that "in all cases where any road, its directors, officers, or agents, shall hereafter enforce or attempt to enforce or exercise any authority over any other road, situated as provided in said first section or do any act in conflict with said first section, such officers or agents shall severally be subject to a fine or liability not exceeding five hundred dollars for each offense, to be recovered by action of debt, or by information or indictment, for the use of the county within which such suit shall be instituted." These considerations, as well as others of a kindred character, which need not be adverted to, bring the case fully within the exception to the general rule, that equity will not grant relief to parties concerned in illegal transactions; and if this be so, it is the end of the case as regards the questions raised by the pleas, because, if the transactions between the parties were of the character which the defendant now ascribes to them, the plaintiff, not being *in pari delicto*, is entitled to participate in the property accumulated or its proceeds, which, as between the parties, will be divided according to equity, and it

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has not been argued to the contrary in the defendant's behalf. There is, however, another ground of relief, which should be briefly mentioned. The contracts have been executed on the part of the plaintiff; they were not immoral; and they were illegal only so far as they were prohibited by statute. Taking this to be so, and regarding the parties as truly *in pari delicto*, the case still falls within the general rule, "that if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant relief in the case." Mor. Corp. § 721. He adds: "These doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and although the contracts were held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received." Citing *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Dill v. Wareham*, 7 Metc. (Mass.) 438; *Episcopal Soc. v. Episcopal Church*, 1 Pick. (Mass.), 373; *Whitney v. Peay*, 24 Ark. 22; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Foulke v. San Diego & G. S. R. Co.*, 51 Cal. 365; *Farmers' Loan & Trust Co. v. St. Joseph, etc., R. Co.*, 1 McCrary (U. S.), 247, 2 Fed. Rep. 117; *Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 82; *Tracy v. Talmage*, 14 N. Y. 162, 175, 195; *Sacketts Harbor Bank v. Codd*, 18 N. Y. 240; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490, 496; *Vanatta v. State Bank*, 9 Ohio St. 27; *United States Express Co. v. Lucas*, 36 Ind. 361. See, also, *Pratt v. Short*, 79 N. Y. 437, 445; *Owen v. Davis*, 1 Bailey (S. Car.), 315; *Gilliam v. Brown*, 43 Miss. 641, 644; *W. U. Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.), 558, 562, 3 Fed. Rep. 423; *Lewis v. Alexander*, 51 Tex. 578; *Brooks v. Martin*, 2 Wall. (U. S.), 70, and cases cited; *Planters' Bank v. Union Bank*, 16 Wall. (U. S.), 483, and cases cited; *Central Trust Co. v. Ohio Cent. R. Co.*, 23 Fed. Rep. 306. The leading case of *Brooks v. Martin* was a bill in equity for an account of profits between the parties under an executed partnership contract for the purchase and location of soldiers' land warrants "confessedly against public policy," as well as in violation of the express provisions of an act of congress; but the court held that the partner in whose hands the profits were could not refuse to account for or divide them on the ground of the illegal char-

acter of the original contract, saying, (MILLER, J., page 80 :) "It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of these funds to refuse to do equity to his other partner, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner, or what rule of public morals will be weakened by compelling him to do so. * * * The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case." We are aware that the doctrine of this case has been criticised, and perhaps denied, by some of the state courts; but it was reaffirmed in *Planters' Bank v. Union Bank*, *supra*, and it is not found to have been changed or modified in any subsequent decision. It requires no words to apply the doctrine of *Brooks v. Martin* to the present case; it applies itself. Nor do we find that its application involves any immorality, or that it is forbidden by any other reasons of public policy. Doubtless a court of equity is not positively bound to interfere in cases of this description, and may exercise its discretion; but it is peculiarly the office of equity to do justice, and justice manifestly requires that the defendant should not keep any part of the plaintiff's equitable share of the property it obtained from operating the plaintiff's road, whether legally or illegally. Whatever the legislature may have intended to accomplish by the anti-monopoly act of 1867, there is no reason to suppose their intention was to reward the Concord Railroad for its violation. And, however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associate, contrary to express agreement and common honesty, and which in conscience the benefited party cannot retain. The demurrer to the third plea is also sustained.

Various causes of demurrer to the bill are assigned by the defendant, but at the argument only the one relating to discovery was insisted upon, or need be considered. The bill prays "that the defendant be ordered to make a full, accurate,

and true discovery and disclosure of all and singular the matters and things herein set forth." This is the usual prayer for a discovery, and no objection to its sufficiency is perceived. It is immaterial that the prayer concludes with a request that the "defendant be required, but not under oath, * * * to discover and state, fully and with particularity," certain things specified; for, if the word "answer," which it is said was intended to be used, is substituted for "discover," the first objection of the defendant, that a prayer for a discovery not under oath cannot be granted, is readily obviated.

The second objection, that the policy of the law exempts the defendant and its officials from discovery, is based wholly upon the unfounded assumption that the plaintiff's action is against public policy, and has already been sufficiently considered.

The third and last objection is that the fundamental law does not require the defendant to discover. The argument in its support is that the defendant is charged with the doing of that which was positively prohibited by the act of July 5, 1867; that, if the charge is sustained, each of the defendants is liable to the penalty prescribed by the act; and that they are asked to make discovery of facts which, in any event, would tend to fix their penal liability under that act, contrary to the constitutional provision that "no subject shall * * * be compelled to * * * furnish evidence against himself." This objection is unavailing. See *Currier v. Concord R. Corp.*, 48 N. H. 322. Of course the defendants are not obliged to discover any matters that may expose them to the penalty of the act of 1867; but they cannot do so, however willing they may be, because prosecution under that act is barred by the statute of limitations. The transactions between the parties as to which discovery is sought ended July 1, 1887, and section 10, chap. 266, Gen. Laws, provides that "all prosecutions founded upon any penal statute, which are wholly or in part for the use of the prosecutor, shall be brought within one year, and all other suits and prosecutions thereon within two years after the commission of the offense, unless otherwise specially provided." The demurrer is overruled. Case discharged.

SMITH, J., did not sit. The others concurred.

Executed Ultra Vires Contracts—Estoppel to Set up Defense.—See note 20 Am. & Eng. R. Cas. 537.

Validity of Contracts Between Rival and Competing Railroad Companies.—See *Cleveland, C. C. & I. R. Co. v. Closser*, 45 Am. & Eng. R. Cas. 275, note 291; *Gulf, etc., R. Co. v. State*, 36 *Id.* 481; *South Fla. R. Co. v.*

Rhoads (Fla.), 37 *Id.* 100; Texas & P. R. Co. *v.* Southern Pac. R. Co. (La.), 40 *Id.* 475.

Acquisition by Railroad Company of Competing Line—Construction of Missouri Statute.—In *Kimball et al. v. Atchison, T. & S. F. R. Co. et al.*, 46 Fed. Rep. 888, it is held that Rev. St. Mo. § 2569, which prohibits any railroad company within the state from owning, operating, or managing any other parallel or competing railroad within the state, applies only where both the roads are situated within the state, and the competition between the two must be of some practical importance, such as is liable to have an appreciable effect on rates. Two railroads which do not touch at any two common points, and between which for a distance of 40 miles another railroad is interposed, and whose traffic, except an unimportant amount, would in no event pass over the other, are not competing lines, within the meaning of the statute.

As to what constitutes competing lines see also *Gulf, etc. R. Co. v. State*, 36 Am. & Eng. R. Cas. 481; Texas & P. R. Co. *v.* Southern Pac. R. Co. (La.), 40 *Id.* 475.

MILLER *et al.*

v.

NEW YORK, LACKAWANNA & WESTERN R. CO.

(*New York Court of Appeals, Dec. 16, 1890.*)

Lease—Construction of Embankment—Liability of Lessor.—Under the general rule that the lessor of a railroad is not liable for the negligence or torts of the lessee, a railroad company cannot be held liable for damages caused by the washing of earth from an embankment erected by the lessee, which the lessor was not bound by statute or contract to build and which was not necessarily a nuisance. The fact that the lessor was bound under the lease to pay the lessee for any work chargeable to construction cannot make it liable.

APPEAL from Superior Court of Buffalo, General Term.

John G. Milburn, for appellant.

Seward A. Simons, for respondents.

EARL, J.—On the 2d day of October, 1882, the defendant, a railroad corporation, organized under the laws of this state, owned a railroad completed for operation, extending from Binghamton to the city of Buffalo, and Case stated. on that day it leased its road with all its real estate, personal property, and franchises to the Delaware, Lackawanna & Western Railroad Company, a Pennsylvania corporation. The term of the lease was for the corporate life of the lessor, and any extension thereof. In consideration of the lease the lessee agreed to pay all the debts of the lessor, then existing and outstanding, and, during the enjoyment of the demised property, also agreed to pay all the taxes upon the same, and,

to the holders of the capital stock, interest at the rate of 5 per cent. per annum in quarterly payments. The lessor agreed to maintain its organization as a corporation, and from time to time, during the continuance of the lease, upon the request of the lessor to "make, execute, issue, and deliver to the party of the second part the bonds, other obligations, or stock of the said party of the first part, or part bonds, part other obligations, and part stock, as the said party of the second part may request, for such amount and to such extent as may be required by the said party of the second part, for the construction and purchase of locomotives, machinery, cars, and other equipments for said railroad, and for the construction of any extension or branches, or any other railroads, which the said party of the second part may, in the exercise of the rights possessed by, or that may be hereafter possessed by, the said party of the first part under the laws of the State of New York, or otherwise, desire to have constructed, and for all other things, work, or works which the said party of the second part may desire to have done in the exercise of said rights, the cost of which is properly chargeable to construction account. And the said party of the second part shall, during the continuance of this indenture, use and operate the said railroad, and do and perform all acts and things which the party of the first part, as owner of the property and franchises hereby demised, would be bound by law to do and perform had this indenture not been made." The lessee agreed at all times to keep the demised property in repair at its own expense. The lessee entered into possession of the demised property under the lease on the day of its execution, and has ever since been in possession thereof. The lessor owned land adjacent to the land of the plaintiffs, and upon its land had, before the date of the lease, constructed trestle-work for the tracks of its road, and the lessee operated the road on and over this trestle-work under its lease for about two years, when it began to fill in the trestle in the rear of the plaintiffs' land, and prosecuted such filling to completion in 1885. This filling made a high embankment so near to the land of plaintiffs that, in the times of rains and melting snow, sand and earth were washed and flowed therefrom upon the land of the plaintiffs, thus causing the damage complained of by them. The embankment was constructed under the direction of the officers of the lessee, and under contract with it. But it charged the cost thereof to the lessor, and the lessor issued and delivered to the lessee its bonds for the payment of such cost, under and in pursuance of the terms of the lease above mentioned.

These are the facts, and there was no dispute about them

upon the trial, and upon them the trial judge charged the jury that the plaintiffs were entitled to a verdict. In this we think there was error. It is conceded that the lease was valid, and that the lessee obtained the possession of the property, including the land upon which the embankment was constructed, and operated and maintained the railroad thereunder. *In re* New York, L. & W. R. Co., 99 N. Y. 12, 23 Am. & Eng. R. Cas. 43. The lessor was not bound by statute or contract to build this embankment, nor was it bound to keep the trestle in repair. There was no proof or claim at the trial that the trestle was not adequate at the time of the lease, or that it was then a nuisance. The lessee was bound to keep it in repair, and to protect those who had occasion to use it from any injury in consequence of its dilapidated condition. The lessor out of possession was under no such obligation. *Wasmer v. Delaware, L. & W. R. Co.*, 80 N. Y. 216; *Edwards v. Railroad Co.*, 98 N. Y. 245; *Ahern v. Steele*, 115 N. Y. 203. The lessor of a railroad is not liable for the negligence or torts of the lessee. This has been so frequently decided that an extended citation of authorities is not needed. *Pierce, R. R.* 283; *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425; *Mayor, etc., v. Twenty-third St. R. Co.*, 113 N. Y. 311. The lessor cannot be made liable for these damages because it was bound under the lease to issue to the lessee its bonds for the cost of any work chargeable to construction. The work was nevertheless the work of the lessee. It did the work in its own way, and the lessor had no control thereof. In doing the work the lessee was in no way working under the lessor, and in reference thereto, the lessor was in no way the superior of the lessee in such a sense that it was bound to respond for the acts of the lessee. *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178; *Ferguson v. Hubbell*, 97 N. Y. 507. This is not a case where the embankment was necessarily a nuisance, and injurious to the plaintiffs. It could have been built with retaining walls or ditches on the sides thereof, so that the earth and sand from the same could not be washed upon the land of the plaintiffs. We are therefore of opinion that the judgment should be reversed, and a new trial granted, costs to abide event. All concur, except PECKHAM, J., not sitting.

Lessor not
liable for in-
jury.

Liability of Railroad Company for Torts of Lessee.—See *Briscoe v. Southern Kan. R. Co. (C. C.)*, 40 Am. & Eng. R. Cas. 599; *East Line, etc. R. Co. v. Culberson (Tex.)*, 38 Am. & Eng. R. Cas. 225; *Nugent v. Boston, etc., R. Co. (Me.)*, 38 *Id.* 52, note 62; *Ricketts v. Chesapeake & O. R. Co. (W. Va.)*, 41 *Id.* 42, note 48; *Va. Midland R. Co. v. Washington (Va.)*, 43 *Id.* 688.

Liability of Company Operating Road for Injury Where There is no Evidence to Show Lease or Ownership.—In *Pennsylvania R. Co. v. Sellers*, 127 Pa. St. 406, which was an action against a railroad company to recover damages for personal injuries, it appeared that the injuries were inflicted upon the track and by the engine and cars of another company. There was no direct testimony that the road of such company was then owned or leased by the defendant; yet, there being evidence of facts and circumstances sufficiently tending to show that the defendant then operated it, it was held not to be error to submit the question of defendant's responsibility to the jury.

Action Against Lessor and Lessee of Railroad—Removal of Cause by one Defendant.—In *Spangler v. Atchison, T. & S. F. R. Co.*, 42 Fed. Rep. 305, it was held that an action for a tort against two railroad companies—one a lessor and the other a lessee—being joint and several, may be removed by one of the defendants on the ground of non-residence, though the other defendant is a resident of the same state as the plaintiff.

Consolidation of Railroad Companies—Citizenship—Removal of Cause.—Notwithstanding the consolidation of two railroad corporations of different states, each retains its identity as a corporation of the state in which it was originally created; and in a suit against the consolidated corporation brought in one of such states, it cannot obtain a removal to the federal courts on the ground that it is a citizen of the other state, though the consolidation was had under the laws of the latter. *Paul v. Baltimore, O. & C. R. Co.*, 44 Fed. Rep. 513.

Conditional Sale of Stock—Cancellation—Fraud.—Where the original owner of the majority of the corporate stock of a railroad company transferred his stock to another, on the condition that the latter should negotiate him a loan and have him elected president of the company, and after the offer of the purchaser to make the loan he declined it, and violated his trust as president by endeavoring to sell the stock sold by him to such purchaser to a competing line, whereupon he was not re-elected president, such purchase will not be set aside at the suit of the personal representative of the seller, on the ground that the purchaser did not comply with the conditions of the sale, although the latter made sham sales of the stock to third persons in the fear that his purchase might be set aside. *Healey v. Loveridge (Md.)*, 19 Atl. Rep. 921.

Personal Liability of Stockholders—Claims for Labor in Construction of Road—Sufficiency of Complaint.—Under Rev. St. of Ind. 1881, Sec. 3934, which makes stockholders in a railroad corporation individually liable to laborers for all labor done in the construction of the railroad which shall remain unpaid after the assets of the corporation shall have been exhausted, a complaint which alleges that the plaintiffs are the holders of unsatisfied judgments against an insolvent railroad company and which seeks the recovery of the personal judgment against the defendants to the action, who are alleged to have subscribed to the stock of said corporation, and to have been stockholders therein at the time the several debts due the plaintiff's were incurred, fails to state a good cause of action, in the absence of any averment that the defendants, as subscribers to the stock, are indebted for unpaid balances, or that the plaintiff's claims were for labor done in the construction of the road. *Toner v. Ferguson*, 125 Ind. 224.

Penalty for Failure of Railroad Company to Make Report—Right of Private Party to Sue for Penalty.—The penalty to which a railroad company is liable under Code N. Car., § 1960, which says that any railroad corporation failing to make an annual report to the Governor, as required by § 1959, shall be liable to a penalty of \$500, to be sued for in the name of the state, is recoverable only by the state and a private person can have no interest in it, although § 1212 enacts that when the act imposing a penalty does not

provide "to what person the penalty is given, it may be recovered by anyone who will sue for the same and for his own use." Under Const. N. Car. Article 9, § 5, this penalty should be paid to the school fund. *State ex rel. Hodge v. Marietta & N. G. R. Co.* (N. Car. Supreme Court, March 25, 1891), 12 S. E. Rep. 1041.

Parol Agreement by Contractors to Assume Debts of Company—Evidence to Establish Contract.—In a suit upon an alleged parol agreement by railroad contractors to assume the debts of the railroad company, the defendants denied making the agreement, and two of the company's directors, who were present at the meeting at which said agreement was alleged to have been made, corroborated their testimony. Two other directors and the secretary of the company testified that the agreement was made. Shortly after said meeting, one of the defendants wrote a letter to the secretary of the company, in which he questioned the correctness of a statement of the company's debts, and promised to refer it to defendant's agent, but did not deny their liability for the debts. *Held*, that the evidence was sufficient to establish the contract. *Lookout Mountain R. Co. v. Houston*, 44 Fed. Rep. 449.

Malicious Prosecution by Railroad Company for theft of Ties—Probable Cause.—In an action of P. K. against the C. B. & Q. Ry. Co. for malicious prosecution in the arrest and trial of the plaintiff for the larceny of railroad ties, on the oath and evidence of B. F. P., the agent of defendant, *held* that, if from the evidence the agent had reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused was guilty of the offense, and that the agent believed that he was guilty, then there was probable cause for the prosecution of the accused, and therefore malice was not to be presumed on the part of defendant, or its agent. The court below having so instructed the jury upon the trial, and the evidence clearly warranting the instructions given, and the jury having returned a verdict for the plaintiff, *held* error in overruling the defendant's motion for a new trial. *Chicago, B. & Q. R. Co. v. Kriski* (Neb. Sept. 17, 1890), 46 N. W. Rep. 520.

Service of Process on Authorized Agents—Subsequent Appointment of Receiver.—In *Simpson v. East Tennessee, V. & G. R. Co.* (Tennessee, November 1, 1890) 15 S. W. Rep. 735, it was held that where, in an action against a railroad company, there has been service of summons on an agent duly appointed by defendant, who had never been discharged, it is no ground for a plea in abatement by the railroad company, that, since the appointment of such agent, the railroad had gone into the hands of a receiver.

Service of Process on "Regular" Ticket Agent—Defective Returns.—In *Tallman v. Baltimore & R. Co.*, 45 Fed. Rep. 156, it was held that under Rev. St. Ohio, § 5044, which provides that process against a railroad company may be served upon any regular ticket or freight agent thereof, a return that the summons was served upon a "ticket agent or general agent" of the defendant, is defective, since it does not show that the person upon whom the process was served was a "regular" ticket agent.

Residence of Railroad Company—Absence of President from State—Residence of Vice President.—Under Civil Code Prac. Ky., § 73, providing that an action against a common carrier, whether a corporation or not, for an injury, must be brought in the county in which the defendant resides, etc., and § 732, subsec. 33, providing that "the chief officer or agent of a corporation, which has any of the officers or agents herein mentioned, is (1) its president (2), its vice-president, * * *" the residence of a railroad corporation which has no president in the state is determined by the residence of its vice-president, there being one in the state. *Harper v. Newport News & N. V. R. Co.* (Kentucky, September 9, 1890), 14 S. W. Rep. 346.

BRADFORD, ELDRED & CUBA R. CO.

v.

NEW YORK, LAKE ERIE & WESTERN R. CO.

(123 New York, 316.)

Contract to Make Up Deficiency in Earnings—Specific Performance.—A contract by one railroad company to advance money to make up any deficiency of the net earnings of another railroad company to pay interest on its bonded indebtedness, will not be specifically enforced where the obligation to repay such advances would arise upon demand.

Same—Same—Insolvency of Company.—The unforeseen insolvency of a railroad company is a sufficient reason for denying the specific performance of a contract by one railroad company to advance money from time to time to make up a temporary deficiency in its net earnings to pay interest on bonded indebtedness.

Same—Same—Accounting—Equity Jurisdiction.—Equity has no jurisdiction on the ground that an accounting is necessary of a suit to enforce a contract to make up the deficiency in the amount of the net earnings of a railroad company to pay interest on its bonded indebtedness, where the plaintiff company alleges that there have been no net earnings and the complaint asks for the full amount of the interest.

RÜGER, C. J. and FINCH, J., dissent.

APPEAL from judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the lower court in favor of plaintiffs in an action brought to compel specific performance of an agreement to loan money.

On March 12, 1883, the plaintiff and defendant companies entered into an agreement by which the Eldred Company agreed to deliver to the Erie Company for transportation all the freight and passengers which it could lawfully control or influence destined to points reached by the Erie Company or its connections, and to deposit with the Erie Company a majority of its own capital stock, while the Erie Company agreed to use its influence and exercise its control to promote the interests and business of the Eldred Company and to make good any deficiencies in the net earnings of the Eldred Company to meet the interest on its bonded indebtedness from time to time, as the same became due and payable, for which advances the Erie Company was to have a first lien on the Eldred road and franchises next after the bonded indebtedness, and also a first charge upon its surplus earnings next after payment of accruing interest on the bonded indebtedness.

This action was brought to compel specific performance of

the Erie Company's agreement to make good deficiencies in net earnings to meet accruing interest, the plaintiff company alleging that it had performed its part of the agreement.

Benj. H. Bristow, Matthew Hale, Charles Steele, and David Wilcox, for appellants.

Wm. McFarland, for respondent.

PECKHAM, J.—The members of the court are not agreed upon the question of the validity of the contract in this case, and therefore no opinion thereon is expressed. A majority of the court, however, is of the opinion that the judgment herein must be reversed upon grounds which do not touch upon its validity, and I will briefly state what they are. The judgment provides for the recovery, by the plaintiff company, of the full amount of the interest on its bonded indebtedness which had accrued prior to the entry of such judgment, and, of course, long after the commencement of the action. The action was thus treated as an equitable one, in which relief might be granted up to the time of the entry of the decree. As the plaintiff had been unable to pay any portion of the interest due on its bonds for some time prior to the entry of such decree, the full amount of that interest was therein decreed to be paid by the defendant to the plaintiff. The theory of the recovery was that, the defendant having promised to advance the money necessary to make good any deficiencies in the net earnings of the plaintiff company to pay the interest on its bonded debt, therefore the defendant must make such advances, and judgment was given decreeing their payment to the plaintiff. This is substantially a decree for the specific performance of a simple contract to advance money to the plaintiff company. Generally speaking, equity does not decree a specific performance of such a contract. This case is sought to be distinguished from this general rule by the fact that the defendant under this contract, while bound to make the advances, even if there were an entire failure of net earnings, had no right, under it, to claim repayment of such advances until net earnings should be made, and that the repayment must proceed from such fund. It is urged that this is one of the chances taken by the defendant when it agreed to make such advances, and that the consideration for such agreement to advance, and to rely for repayment upon the future existence of, a fund arising from net earnings, was to be sought in the other part of the agreement by which the defendant was to reap the advantage of the so called traffic arrangement between the two companies. Under such circumstances, it is claimed that the case is taken out of the

Plaintiff's
theory of the
action.

general rule as to specific performance in equity, and that the defendant ought to be decreed to make the necessary advances to pay the interest on the bonds of plaintiff company, without any proof of damage to the company, so long as the defendant by its agreement has bound itself so to do, and to look for repayment for such advances only from a fund which does not now exist, and which, so far as present indications would tend, will never exist again. But even assuming that the fact contended for would alter the rule in

**Defendant's
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equity, I am not able to so construe this agreement as to admit that the defendant has no right to demand repayment of its advances, except from the fund created by the net earnings of the plaintiff company. By the terms of the agreement, it is true that security for the repayment of the advances was given by providing for a first charge in favor of defendant on such net earnings, next after the payment of the accruing interest upon its bonded indebtedness, but the agreement also provided, as a further security to defendant for such repayment, for a first lien upon the property and franchises of the railroad company. The result was to give the defendant all the security the plaintiff company could give for the repayment of the advances made by it, but, because all the security possible was given, including a specific charge on a special fund, it by no means follows that the defendant should have no right to attempt to enforce payment of the advances until the special fund existed upon which the defendant was given a specific lien. Nothing in the agreement, that I can see, would prevent the defendant from foreclosing the lien upon the property and franchises of the plaintiff company, (subject of course to the first mortgage,) at any time it should see fit to do so, in order, if possible, to secure repayment of its advances, or, failing in that, then to obtain possession of the road at a sale thereof under such foreclosure. Or defendant might proceed in an ordinary action at law to obtain a judgment for the amount of its advances. The fact that no net earnings had been made, and that there was no fund arising therefrom out of which to pay the advances, would constitute no defense to either action. There was no time stated in the agreement for the repayment of such advances, and nothing is contained therein, that I can see, which makes it necessary for any particular time to elapse, or for any particular thing to happen, after the making of the advances, before their repayment becomes due. From an attentive reading of the case, it may be fairly assumed that both companies supposed there would be net earnings, and that a failure to

realize them at any particular time would be only temporary and, hence, a provision for a first charge thereon, as made in the agreement, was not a mere empty provision, or one which either party supposed would never be capable of enforcement. But that does not alter the character of the obligation which the plaintiff company assumed, and that obligation was in strictness, I think an obligation to repay the advances immediately or upon demand. *Thompson v. Ketcham*, 8 Johns. (N. Y.), 190; *Purdy v. Philips*, 11 N. Y. 406. These authorities show that, where no time of payment is specified in a contract for the payment of money, it is payable immediately. The law is so well settled on that point as scarcely to warrant the citation of authorities. There is nothing in the contract in question from which a different time of payment can be asserted, and none can properly be reasoned out. We may suppose that neither party thought it probable that a claim for a repayment of any advance would be made at once or shortly after such advance was made, but we are dealing with the strict legal right of the defendant under the contract, and that right is not altered or diminished by the expectations or beliefs of the parties.

The whole substance of the agreement, so far as the advances are concerned, is that an obligation was assumed by the defendant to advance money enough to make up any deficiency in the net earnings to pay the interest on the bonded indebtedness of the plaintiff company, and that company was placed thereby under an equal obligation to repay to the defendant the amount of such advances upon demand, or, in other words, immediately. Such an obligation is not the subject of a decree for a specific performance in equity. If there be any remedy at all, that remedy is at law, by a recovery of damages. *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.), 463; *Sichel v. Mosenthal*, 30 Beav. 371; *Crampton v. Varna R. Co.*, L. R. 7 Ch. 562; *Pierce v. Plumb*, 74 Ill. 326, 330, 331. Of course in the action at law there must be proof in the case showing in some form, and to some extent, the amount of the damages that the plaintiff has sustained by the defendant's breach of his agreement. And it is equally plain that it must be a rare case indeed where it can be said that a person has sustained any damages by the refusal of another to advance money which he has agreed to advance, where the person to whom it is to be advanced is, by the agreement, under a valid obligation to pay it back immediately. Equity, at all events, never enforces such an agreement, and in a court of law there must be proof of damages.

But we may assume, without deciding, that the defendant,

in case it advances the money, would not have the legal right to demand an immediate repayment, and consequently, would not have the right to maintain an action to enforce it, although not compelled to await the existence of net earnings before claiming such repayment. There yet remains an unanswer-

Effect of insolvency of plaintiff company.

able objection to the maintenance of this action, and that objection lies in the fact that the plaintiff company is, and for some time prior to the commencement of this action had been, hopelessly insolvent, and the payment of the interest on its bonds by the defendant would be neither more nor less than a pure gift, as the plaintiff could not repay it and the security for such repayment proves to be entirely worthless. This is a condition of things not contemplated by either party at the time of the execution of the contract. It is claimed that the insolvency of the plaintiff company was one of the facts which the contract provided for, as the plaintiff company would be insolvent if it could not earn enough to pay its operating expenses, and the interest mentioned, and that it was in just such case that the contract provided for an advance by the defendant to the plaintiff company. But this is clearly not the correct construction. The contract was made March 12, 1883. The plaintiff company was chartered in 1881, and in the year 1882 it had earned more than enough to pay operating expenses, and interest on its bonds, and a dividend to its shareholders, besides leaving a surplus in its treasury. It never could have been contemplated that the company would permanently cease to earn enough even to pay operating expenses, and it cannot be supposed that it was ever in the thoughts of the officers of either of the two companies that the time would speedily come when such a contingency would arise and seemingly become a fixed financial condition. The obligation to continually pay the interest on the bonds of a company which could not earn enough to pay its own operating expenses, is one which we cannot, in the light of the proved facts in this case, credit the plaintiff company with obtaining, or charge the defendant with assuming. The consideration which the defendant would obtain by reason thereof is grossly insufficient to predicate the voluntary assumption by it of any such obligation. I think it may be properly assumed that the obligation to advance was founded upon a belief that, in the future, it might be with the plaintiff company, as with others, owing to temporary embarrassments or the working of unforeseen though temporary causes, a contingency might arise by which a particular payment of interest could not be made because of an insufficiency of net earnings from which to pay it, and in that event

the defendant was to advance enough to make up such deficiency, and this advance was to be secured by the pledge of the future net earnings. It was clearly contemplated and supposed that there would be such earnings, although their existence was not a condition precedent to the right to claim repayment for such advances. A perusal of the whole agreement leaves upon my mind a clear impression that it was assumed there would generally be sufficient net earnings to pay the interest on the bonds of the plaintiff company, but that the contingency might, "from time to time," arise when there would be a temporary deficiency in such net earnings to pay such interest, and, in that event, the defendant was bound to advance enough to make such payment, taking, as security for a repayment thereof, the first charge upon the net earnings fund after the payment of the interest, and a first lien on the property and franchises of the corporation after the mortgage bonds. This of course contemplates that there would be such surplus net earnings, and not that there would be a continuous annual deficit therein, together with a deficiency in the earnings to an extent rendering it impossible to pay the ordinary operating expenses of the railroad. Events subsequent to the making of the agreement have actually placed the plaintiff company in a position where, for a long time, its earnings have scarcely, if at all, equaled its operating expenses, and where, if the defendant were to advance a sum sufficient to pay the interest, or any part thereof, on the plaintiff company's bonds, it would find that the security for repayment provided for by the agreement had become, contrary to the expectations of both parties, of no value. To enforce the specific performance of such a contract would work an unexpected hardship upon the defendant, and would, in truth, do it great injustice. A contingency has happened in this case, not within the contemplation of either of the parties to the contract, to-wit, the continuous failure of the plaintiff company to earn money enough to pay all its operating expenses: and, hence, the failure of the plaintiff company to realize net earnings out of which to pay the interest, or some portion thereof, on its bonds, has been not only partial, but complete; not "from time to time" only, but all the time; and hence it would be oppressive for a court of equity to enforce performance. Under such circumstances, no specific performance will be decreed. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, and cases cited.

Thus far I have considered this case as if it were an action in equity asking for a decree for the specific performance of the agreement. As thus considered I think the action, for

the reasons already stated, cannot be sustained. But it may be urged that an accounting was necessary between the parties, and, hence, a court of equity had jurisdiction to take it, and having obtained jurisdiction for one purpose, would retain it for all, and give final relief. The answer is that no accounting whatever is necessary. The plaintiff simply alleged that there had been no net earnings, and therefore asked that the full amount of the interest on its bonds should be paid to it by the defendant company. The fact of there being no net earnings was a fact to be proved like any other fact. To make such proof it might be necessary to examine the books of the plaintiff company for the purpose of discovering what the gross earnings had been, and how such gross earnings had been paid out. But that involved no "accounting" between these parties, as such term is used in speaking of the jurisdiction of a court of equity over the matter of accounts. If, however, the action be regarded as one at law, seeking to recover money damages for a violation of the agreement by the defendant, I am of the opinion there is a fatal defect in the plaintiff's case. In the first place no facts are pleaded showing any damages sustained by the plaintiff company, consequent upon defendant's alleged violation of the agreement, and, in the next place, no facts are proved which show that the plaintiff company has, in truth, sustained any damages.

It would seem that the whole agreement taken together shows that, whatever obligation the defendant might rest under to make the advances to cover up the deficiencies alluded to, yet if this obligation were performed by defendant, and the moneys were in fact advanced, an equal obligation would at once spring up on the part of the plaintiff company to repay such money immediately or as soon as the defendant should ask for its repayment. However this may be, certainly no damages have been proved by the insolvent company plaintiff arising from the failure of defendant to pay this interest. The claim that the plaintiff company has in all things performed its part of the contract, and it would therefore be inequitable to permit defendant to repudiate its obligations, does not meet the objection of the unforeseen insolvency of the plaintiff company. The facts of the case do not bring the plaintiff within the principle of a part performance by it, and a resulting liability on defendant's part to specifically perform for the future. While not necessary to the determination of this case upon the grounds already discussed, the argument that the plaintiff company has lost the right to claim performance by the defendant because the corporate

control of plaintiff company by defendant, provided for in the contract, has been lost by the appointment of a receiver, does not lack plausibility. If it has not lost the right on that ground, we think it plain that the right has been lost by this unexpected contingency,—the insolvency of the plaintiff company. For these reasons we are of the opinion that the judgment herein should be reversed, and a new trial ordered, with costs to abide the event.

Specific Performance of Contracts with Railroad Companies.—See *Chicago, R. I. & P. R. Co. v. Union Pac. R. Co.* and note, *ante* pp. 340, 358.

CROSS

v.

WEST VIRGINIA CENTRAL & PITTSBURGH R. CO.

(*West Virginia Supreme Court of Appeals, March 24, 1891.*)

Election of Directors—Cumulative Voting by Stockholders—Mandamus.—The West Virginia Central Railway Company is subject to the laws of this state, which provide that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote in person or by proxy for the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit, and that this mode of electing may be enforced by *mandamus*.

Service on Directors by Publication.—An order of publication in such case can be taken against such persons, members of the board of directors, as are non-residents.

UPON petition for writ of *mandamus*.

Price & Flournoy, for petitioner.

C. W. Dailey and W. C. Clayton, for respondent.

HOLT, J.—The relator, W. Irvine Cross, claiming to have been duly elected by the cumulative system of voting one of the board of directors of the railway company for the year commencing on the 27th January, 1891, and that he is unlawfully held out of his office by one T. B. Davis, acting at the same instance and under the advice of the railway company, did on the 11th February, 1891, sue out of this court this alternative writ of *mandamus* against the company, T. B. Davis, and others, to show cause why the peremptory writ of *mandamus* prayed for to receive and recognize him as a member of such board should not be granted. By section 3, art 8, Const., (Code W. Va. p. 32,) the supreme court of appeals has both original and appellate

jurisdiction in cases of *mandamus*. But by rule of court No. 13 (23 W. Va. 829) application is not to be made to this court in the first instance unless special reason be shown. The special reason shown was that it was not likely that the relator in the ordinary course of business could get the case finally determined within the year if the proceeding were commenced in the circuit court. The defendant railway company claims the inception of its present charter under and by virtue of the act of the legislature of February 26, 1866, (chapter 80, Acts 1866;) section 4, art 11, State Const., (Code, p. 40;) and various acts made in pursuance thereof provide that in all elections for directors, etc., the stockholders may cumulate their votes. Plaintiff claims that the defendant company is subject to this law. Defendant claims that the constitution and laws in that regard do not apply to it. This is the main question in controversy sought to be determined by this proceeding. Does the right to

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cumulate votes apply to the defendant company? Various answers by way of return have been filed, among them the answer of the defendant company, to which plaintiff has demurred, so that the facts out of which the point of law must arise are determined by the pleadings. The legislature of the state of West Virginia, by act of 26th February, 1889, (see Acts 1866, p. 80,) incorporated the people named, and such other persons as might become associated with them, as a body corporate by the name of "The Potomac and Piedmont Coal and Railroad Company." The persons named, H. G. Davis and six others, were to manage the affairs of the company as directors constituted for the purpose until directors should be elected as provided for. The first section gave power and authority to make and pass such by-laws, rules, and regulations as might be deemed necessary and proper, "provided however, that such by-laws should not be repugnant to any law of this state or of the United States." Capital stock was not to exceed \$5,000,000, divided into shares of \$100 each, to be personal property, "and each share thereof shall entitle the holder thereof to one vote in all meetings of the stockholders of said company." The ninth and last section reads: "The legislature reserves the right to alter or amend this act," but such alteration shall not affect or impair the right of the creditors to have the property applied in discharge of their respective claims, or of the stockholders to have the surplus distributed according to their respective interests. I quote these parts of the act of incorporation of the original company because defendants claim that the mode of voting—one share, one vote—is of the nature of a

contract binding the state not to impair it, and that the requiring and authorizing cumulative voting is such impairment, and is obnoxious to section 10, art. 1, of the constitution of the United States. But the conclusion on this point, reached after careful consideration, is that the state constitution and laws authorizing a stockholder to cumulate his votes constitute no such impairment, for the reason, among others, that the legislature in the last section of the act of incorporation reserves the right to alter and amend, and in the latter part of the first section requires that all the rules, by-laws, and regulations shall not be repugnant to any law of the state then in force, or which might be passed under the power reserved. In *Hays v. Com.*, 82 Pa. St. 518, such a mode of voting was held to be within the protection of the constitution of the United States as within the obligation assumed by grant of the charter. I do not propose to discuss this question. Here the power to alter is reserved, and such mode of voting is not irrepealable or beyond amendment. *State v. Miller*, 30 N. J. L., 368, 86 Am. Dec. 188, and notes; *Murray v. Charleston*, 96 U. S. 432; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697.

The incorporators constituted directors by the act as such accepted the charter, and appointed persons to obtain subscriptions, and on 9th March, 1871, they met in the town of Piedmont, Mineral county, W. Va., and passed a resolution that enough stock had been subscribed to justify the company in proceeding with their business. By act of 16th February, 1871, (Acts 1871, p. 74.) time was given to organize within three years from the date of the act. As early as January, 1872, the company had surveyed a large part of the line of its proposed railway in Mineral county. The present constitution of West Virginia was adopted and took effect on the 22nd day of August, 1872. Article 11, § 1, (see Code, p. 40,) forbids the creation of corporations by special law. Section 3 extends the time for organizing for two years from the time the constitution should take effect. Section 4, art. 11, reads as follows: "The legislature shall provide by law that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote in person or by proxy for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of the shares of his stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be

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elected in any other manner." I see no reason why this latter clause should not be construed as of its own force controlling the manner of electing directors under this charter prospectively. But if it needed legislative enactment to put this constitutional provision in force this was made in the language of the constitution by act of December 20, 1873. See Acts 1872-73, p. 535, chap. 181. This was re-enacted in the general law of March 14, 1881. See § 56, chap. 17, Acts 1881; also § 67, same act, (Acts 1881, p. 236.) Section 67 provides that "all existing railroad corporations within this state shall respectively have and possess all the powers and privileges and be subject to all the duties and liabilities and provisions contained in this chapter." And these two sections are in the present Code. See Code W. Va. (Warth's Ed. 1887) pp. 523, 526, chap. 54, §§ 56, 67. By act of February 23, 1881, (see Acts 1881, p. 311,) the act of February 26, 1866, incorporating the Potomac & Piedmont Coal & Railroad Company was amended and re-enacted, changing the name to the "West Virginia Central and Pittsburgh Railway Company," retaining the provision that the rules, regulations, and by-laws shall not be repugnant to any law of the state or the United States; also the section reserving the right to alter and amend; also in § 2 that provision that each share shall entitle the holder to one vote; and it is hardly necessary to add that this provision is nugatory, and of no effect, being in the teeth of the constitutional provisions, and of earlier and later laws made in pursuance thereof. See Act March 25, 1882, (§ 44, chap. 96, Acts 1882.) This corporation was created by the laws of this state, its road runs through the counties of Mineral, Grant, Tucker, and Randolph, and there can be no reasonable question that the stockholders have and had on the 27th January, 1891, the right to cumulate their votes in voting for the election of directors.

The president of the company, Henry G. Davis, resides in this state; also defendant Thomas B. Davis, who is recognized by the company and by its board of directors as a director filling the place as one of the directors that the relator was duly elected to fill. The company has an office in the county of Mineral, and an agent residing there, appointed in pursuance of our statute to accept service of process. The chief office is in the city of Baltimore, but by by-law the annual meeting of the stockholders may be held in that city or in the town of Piedmont, Mineral county. On January 27, 1891, at the regular annual meeting of the stockholders held at Piedmont, W. Irvine Cross, the relator was duly elected by the cumulative manner of voting one of the board of directors for the year commencing January 27, 1891, and ending

January 27, 1892, receiving from stockholders owning nearly \$1,000,000, or one-fifth of the par value of the whole stock, more than 50 per cent more votes than any other one. *Henry C. Davis, Stephen B. Elkins, John A. Hambleton, James G. Blaine, R. C. Kerens, and W. W. Taylor were duly elected as six of the seven directors, each receiving 44,193 votes, and the relator, W. Irvine Cross, as a question of admitted fact, if our view of the law is correct, was also elected as director, receiving 68,600 votes; yet the company by its executive head declared defendant Thomas B. Davis elected, who received but 44,093, votes, the least of all, has since recognized him as a director, and refused to declare the relator to be elected and to recognize or permit him to act as such. All this was done, I have no doubt, in good faith, believing, as they were advised, that the law of cumulative voting did not apply to their company, or, if applying, was of no effect as impairing the state's charter obligation. Of these seven defendants Henry G. Davis, Stephen B. Elkins, and Thomas B. Davis are residents of this state; the others, four in number, are non-residents, and have been proceeded against by order of publication duly taken and executed.

Is *mandamus* in this state, the proper remedy? The respondents say not; that it should have been by writ of *quo warranto* or information in the nature of such writ.

In some states a *quo warranto* information is used to test the title of directors in an incorporated company. Why it has not been so used in this state

Mandamus as the proper remedy.

the following, among other, reasons may be given: It is the appropriate remedy for resuming or abolishing corporate privileges and franchises granted, but non-used or misused, or for usurpation of such as are not conferred by law, or have been obtained by fraud, or are used for a purpose not authorized, and against any person who shall intrude into or usurp any public office, but not in the latter case when it is comprehended by the statutory mode of contesting an election. All these, without intending to be an exhaustive enumeration, are mentioned in our statute. Code W. Va. p. 739. But the traditional history of the remedy has not been such with us as to induce its use in doubtful cases, or to lead to the gradual enlargement of scope; and as to office we have adhered to the idea that it applies to a public one, and not to the functionaries of private corporations. We have but two reported cases on the subject of information in the nature of *quo warranto*: Com. v. Birchett, 2 Va. Cas. 51, to remove a justice of the peace, decided by the general court in 1816; and Com. v. President, etc., *Id.* 190, decided in 1819 to vacate the charter. Another reason might be that, although the in-

cumbent might be removed by this proceeding, a *mandamus* might still be needed to compel the relator to be inducted or reëlected.

Mandamus: On January 22, 1799, an act was passed removing certain difficulties and delays attending the proceedings on writs of *mandamus*, and this statute, without change, is a part of our present Code. See chapter 109, p. 739. Those familiar with our circuit court practice in *mandamus*, or those who have taken the trouble to examine the 50 cases that have found their way to our courts of last resort during the past 100 years, know that our practice is to enlarge and advance this remedy, rather than to restrict and restrain it, to allow amendments to meet the justice of the case, and to make it flexible to accomplish the relief to which the party shows himself entitled where there is no other complete and adequate legal remedy. *Smith v. Dyer*, 1 Call. side paging 562, is one of our earliest reported cases, decided April 27, 1799. Here Abraham Smith was *de facto* clerk of the county court of Pendleton. The district court granted a rule upon the clerk, Smith, and the justices to show cause why Dyer should not be reinstated. Depositions were taken. Six of the justices returned that Dyer was never duly elected and sworn, but that Smith was duly elected, sworn and admitted. The district court awarded a peremptory *mandamus* to restore, and on appeal to the court of appeals that judgment was affirmed. The writ was not served on all the justices, but upon those composing the court on June 6, 1798. *Dew v. Judges*, 3 Hen. & M. (Va.) 1, was decided October 13, 1808. The court there held that the writ of *mandamus* is the proper remedy to restore a clerk ousted from his office by the illegal appointment of another person. This is our leading case upon the subject, in which it was contended that *quo warranto*, and not *mandamus*, was the proper remedy; but the court held *mandamus* to be proper, citing a case not reported, decided in 1786, in which James Bland was by *mandamus* restored to the office of clerk of the county court of Westmoreland, and that it was the proper remedy to admit as well as to restore to such office. *Booker v. Young*, 12 Grat. (Va.) 306, (decided April 1855), was a *mandamus* to compel the directors of the branch of the Exchange Bank at Clarksville to admit S. D. Booker, the relator, to the office of president of said branch bank. The proceeding by way of *mandamus* seemed to the court to be a fair, convenient, and speedy mode of litigating and deciding upon such questions. In *Fisher v. City of Charleston*, 17 W. Va. 595, and *Fisher v. Mayor, etc., of Charleston*, *Id.* 628, there is a full discussion of our practice in such cases. Aside from the merits, except so far as modes

of procedure are questions of merit, as they may be, the defendants interpose various grounds of objections to the peremptory writ, among them, a motion to quash the alternative writ. "When a writ of *mandamus* is issued the return thereto shall state plainly and concisely the matter of law or fact relied on in opposition to the complaint." Section 1, chap. 109, p. 739, Code. The proceedings in this case were taken in conformity to the practice as recognized and sanctioned in *Fisher v. City of Charleston*, 17 W. Va. 595. A petition was filed, making what was for the occasion taken as a *prima facie* case, and on motion of complainant an order was entered reciting the filing of the petition, which orders the defendants to appear and show cause why the writ of *mandamus* prayed for should not be awarded, and that it might be served by serving a copy of the order, which was to be taken and treated as the alternative writ, to be served by copy, and by order of publication against non-residents. Thus the defendants have treated as the alternative writ, and have moved to quash the same; also to quash the return of service.

To quash the writ: I regard the rule treated as an alternative writ as making a *prima facie* case on facts specifically and sufficiently stated. The motion to quash must therefore be overruled.

Motion to quash return: It is contended by the defendants that no order of publication can be taken against them. The order of the court awards the alternative writ of *mandamus* against the railroad company sued by its corporate name, and each one of the seven persons composing the board of directors, four of whom, as appears by affidavit filed, are non-residents; and against the non-residents an order of publication was entered, executed and returned. Section 2, chap. 124, p. 776, Code W. Va., says: "Process to commence suits, including writs of *scire facias*, *mandamus*, *quo warranto*, *certiorari*, prohibition, and the *alias* or other process, * * * may be served," etc. Section 11, chap. 124, p. 778, *Id.*, says: "On affidavit that a defendant is not a resident of this state in * * * an order of publication may be entered against such defendant." It is hardly necessary to say that the proceeding by *mandamus* is a suit, and by our statute (chapter 109, p. 739, *Id.*) assimilated to the ordinary action at law. The alternative writ is treated as the declaration and the process to be served by copy, the (answer) return as a demurrer or plea, to which return plaintiff may demur or plead, specially or both. Defendants say that the individual members of the board of directors are necessary parties in this proceeding, being the only tangible organ of the corpo-

Proceedings
against non-
residents—
Order of
publication.

rate entity; but, inasmuch as they cannot be reached by attachment or personal judgment, therefore they cannot be proceeded against as non-residents by order of publication. What the court may do or can do is an after matter. If they are not improper parties, then they come within both the letter and spirit of our statute on the subject. We have already said that the order reciting the facts set out in the petition and awarding the alternative writ as matter of convenience and as process to give notice by serving a copy is to be taken as the alternative writ; that defendant's motion to quash it, taken as a general demurrer, must be overruled, seeing that the facts stated therein show *prima facie* that he has the specific right claimed, and that *mandamus* is his proper remedy; and this brings us to the defendant company's answer or return and complainant's demurrer thereto.

Here we assume all the material averments of the alternative writ to be true which are either not denied by the answer or return or not confessed and sufficiently avoided, and all matters sufficiently pleaded in the return or answer are for the purposes of the demurrer taken to be true; but, if the answer or return raises no question of fact then it is but a demurrer itself, to which, of course, no demurrer is necessary. The defendant company, by its answer, says it is a corporation of the state of West Virginia, duly incorporated under the laws of said state, and for cause against the peremptory writ prayed for says that it has no power to receive or recognize the plaintiff as a director for the year beginning 27th January, 1891, but that such recognition can only be made by its board of directors; that the board consists of seven members; that three, naming them, are residents of this state; that one of them, H. G. Davis, has not been served with process, (and this is true); that the remaining four, a majority of the board, are non-residents of the state; that service by order of publication is not sufficient, and that they are without the jurisdiction of this court, and cannot be reached by the process of the court to enforce obedience to its commands; that the writ, although served on G. W. Harrison, the attorney appointed by the company to accept service in ordinary cases as required by statute, yet could not be accepted by Harrison in this case, as he had no authority to recognize the complainant as a director. The rest of the defendant company's answer is taken up with setting out the facts and referring to the act of incorporation and other acts already given. Section 24, chap. 54, p. 508, Code, requires the corporation to appoint some person residing in this state to accept service on behalf of the company, and upon whom service may be had of any process or notice. The record

shows that the alternative writ was served on the defendant company by delivering an attested copy to George W. Harrison, a resident of Piedmont, Mineral county, W. Va., the agent and attorney in fact for said company, appointed pursuant to law by power of attorney dated May 30, 1888, and recorded in that county, to accept service. That would seem to be a good service on the company. I do not think that a railway company created by this state, and having its road in this state, can be considered as without the jurisdiction of the court in a case of *mandamus* because a majority of its board of directors are non-residents. It may embarrass the court in enforcing obedience, but I take it for granted that after it has been authoritatively and finally decided that the system of cumulative voting applies to this corporation, and does not violate any charter right, there will be no necessity of devising extraordinary means to give such decision practical effect. For the reasons given we hold that the law giving the right to stockholders to cumulate their votes in the election for directors or managers applies to the defendant corporation, and that the complainant, W. Irvine Cross, was on the 27th day of January, 1891, duly elected a director for one year commencing on that day; that defendant, Thomas B. Davis, was not elected a director on that day for such year; and that said Davis was improperly and illegally declared elected; and that the complainant W. Irvine Cross should have been declared so elected. We regard the respective answers filed as insufficient in law; that the demurrers thereto are well taken, and that the peremptory writ of *mandamus* should go, requiring the said Thomas B. Davis to vacate the office of director of said company now held by him, and surrender the same to the complainant, W. Irvine Cross, and commanding the defendant company, by its board of directors, officers, agents, and servants, or other proper means, to receive and recognize the complainant, W. Irvine Cross, as such director in the place and stead of defendant Thomas B. Davis.

LUCAS, P. and ENGLISH and BRANNON, JJ., concur.

STANTON *et al.**v.*NEW YORK & EASTERN R. CO. *et al.**(Connecticut Supreme Court of Errors, July 10, 1890.)***Contract of Promoters—Ratification—Forfeiture of Charter—Damages.—**

The promoters of a proposed railroad company contracted with the plaintiff to procure for the company a right of way in consideration of the issuance to the plaintiff of a certain amount of the company's capital stock. The company was incorporated and subsequently ratified this contract. The plaintiff fulfilled his part of the contract by the expenditure of considerable time and money. The railroad company, however, allowed its charter to be forfeited without issuing any stock, the legislature having refused permission to the company to build a bridge essential to the proposed road. Plaintiff sued to recover for a violation of the contract. *Held*, that he was entitled to substantial damages, in estimating which his services prior to the ratification should be considered, such ratification relating back to the date of the execution of the contract.

Same—Same—Evidence as to Power of Company to Procure Subscriptions.—Before the charter of the defendant company was forfeited it had at least \$230,000 of *bona fide* subscriptions to its capital stock which was required by law to be subscribed before filing a certificate of its organization. *Held*, that evidence that the company could procure no subscriptions after the legislature had refused permission to build the bridge and that the company was compelled to suffer the forfeiture, was immaterial and improperly admitted.

Same—Same—Parol Evidence.—The contract between plaintiff and defendant as to the services and compensation being evidenced by a written instrument, it was error to allow defendant to ask a witness whether or not plaintiff "knew that the success of the road depended upon getting the bridge."

APPEAL from Superior Court, Fairfield County.

Suit by Daniel N. Stanton and another against the New York & Eastern Railway Company and others. From a judgment overruling his remonstrance against the acceptance of a report of a committee, refusing to allow his claim, Henry Hungerford appeals.

S. Tweedy and *J. S. Seymour*, for appellant.
J. B. Hurlbutt, for appellees.

ANDREWS, C. J.—The New York and Eastern Railway Company was a railroad corporation organized under the general railroad law of this state for the purpose of building and operating a railroad from the western line of the state in the town of Greenwich to the town of New Haven, a distance of 46 miles, and included a bridge

Case stated.

across the Housatonic river. At the March term, 1875, of the superior court in Fairfield county, upon the application of Daniel N. Stanton and others, Levi Warner, Esq., was duly appointed receiver of all the property and assets of this corporation. Mr. Warner accepted the trust, and gave bond, as required by the decree of the court. At the same term of the court it was ordered that all persons having claims against the corporation should present them to the receiver within 90 days after the publication of the order. Among others, Henry Hungerford, of Norwalk, presented to the receiver in due time a claim against the corporation, amounting to \$200,000. At a later term of the court such proceedings were had that Julius B. Curtis, Esq., was appointed a committee of the court to examine and adjust all the claims so presented to the receiver and not allowed by him, and to make report to the court of his doings in the premises. Mr. Hungerford appeared before the committee, and offered testimony in support of his claim. Various proceedings were had in court and before the committee from time to time, and the committee returned his completed report to the court in June, 1889. Thereupon Mr. Hungerford came into court, and remonstrated against its acceptance. The court overruled the remonstrance, accepted the report, and rendered judgment pursuant thereto. Mr. Hungerford now brings the case to this court by appeal. For a clear understanding of the questions raised by the appeal a somewhat more extended statement is required.

On the 12th day of September, 1873, Henry Hungerford entered into a contract with Samuel E. Olmstead, William C. Street, William T. Minor and Henry R. Parrott, as follows:

“Whereas the New York and Eastern Railway Company are desirous of procuring lands for the right of way, for depots, side tracks, gravel pits, and, other necessary purposes for their railroad, as called for by the terms of the contract between said railway company and D. N. Stanton, and A. P. Balch, and within the limits herein provided,—the assent of the said Stanton and Balch in writing having been obtained thereto,—from the line of the state of New York to the western line of the city of New Haven and from Stratford to Derby: Now, therefore, for that purpose the following memorandum of agreement is this day entered into by and between Samuel E. Olmstead, William C. Street, William T. Minor, and Henry R. Parrott, a committee of the directors of the said railway company, duly authorized thereto, the party of the first part, and Henry Hungerford, of Norwalk, Connecticut, party of the second part: The party of the first

part for all the lands necessary for the above purposes on the line of their said railroad between the western line of the state of Connecticut in the town of Greenwich and the western line of the city of New Haven, and for all expenses for procuring the same except engineering, which shall be paid by the party of the first part, agrees to give the party of the second part five hundred thousand dollars of the capital stock of the said railway company, fully paid up. The said party of the second part will at once, as soon as the engineer has located any part of the line of said railroad, proceed to purchase and procure all such necessary lands on said line at his own charge and expense, and within a reasonable time; and, as fast as required by said company, will cause such lands to be conveyed to said railway company, or to be taken under the statute laws of the state, that said company may enter thereon, and construct their road. The engineer shall lay out such additional lines as may be indicated and required by said party of the second part, subject to the approval of the said company and of the said Stanton & Balch, to enable him to make the most advantageous terms in purchasing said lands for the building of the said road on the most feasible and direct route, as provided by said contract. It is mutually agreed and understood that the party of the second part shall commence at once to procure said lands on such portions of said route as may be required by the party of the first part, and located by said engineer, and as soon as and when he shall cause to be conveyed to said company, or shall procure under the statute the said lands, or any portion thereof, then the party of the first part shall pay to the party of the second part or assigns, according to said engineer's estimate per mile for the property conveyed, compared with his gross estimate, in relative proportion to the sum of five hundred thousand dollars; and, when all of said lands are so conveyed and procured, then the remaining portion, if any, of said five hundred thousand dollars capital stock, fully paid up, shall be paid to the party of the second part or assigns. If said five hundred thousand dollars of capital stock shall be insufficient to purchase and procure said lands, then any additional amount to be used for such purpose shall be a matter of further agreement. Nothing in this agreement shall be so construed as to hold the said party of the second part liable in any way for procuring charters for drawbridges over navigable waters. It is further mutually agreed between the parties hereto that, if any portion of the said right of way between the aforesaid boundaries shall not be taken by said company, then so much of said five hundred thousand dollars as shall be a fair relative proportion of the estimated cost of

said right of way, depot grounds, etc., not taken, shall be withheld by the party of the first part in the final settlement between the parties hereto; and the party of the second part shall have no claim of any kind against said company for time or expenses in so purchasing or procuring said right of way, and that no part of said five hundred thousand dollars of stock or its proceeds shall be used to pay for such time or expenses, except any balance that may be left after purchasing and procuring said lands. In case any disagreement should arise between said parties hereto in regard to any matter provided for or pertaining to this memorandum of agreement, such disagreement or difference shall be submitted to the arbitration of three disinterested persons, either agreed on by the parties or one appointed by each party; and the decision of such arbitrators shall be final and conclusive on the parties to this agreement. In witness whereof the parties hereto, by their own proper hands and seals, have signed this memorandum agreement this twelfth day of September, one thousand eight hundred and seventy-three. S. E. OLMSTEAD. [L. S.] WM. C. STREET. [L. S.] H. R. PARROTT. [L. S.] WM. T. MINOR. [L. S.] HENRY HUNGERFORD. [L. S.]

At that time there was no legally incorporated New York & Eastern Railway Company. There was a voluntary association of individuals calling itself by that name, and which was the preliminary organization formed for the purpose of promoting and procuring the complete incorporation of the company. Of this voluntary association the Messrs. Olmstead, Street, Minor, and Parrott were the officers and directors. Mr. Hungerford commenced at once the performance of the contract on his part, and obtained contracts from many of the owners of land along the line of the proposed railroad; and expended in such work, as he claimed, much time and a large amount of money. On the 10th day of February, 1874, the company became duly and legally incorporated by filing with the secretary of the state its articles of incorporation, as provided by the statute. Mr. Olmstead was made the president of the corporation, as he had been of the preliminary organization, and Messrs. Street, Minor, and Parrott were made directors. On the 27th day of April, 1874, the corporation, by a duly-authorized committee of its directors, consisting of the Messrs. Olmstead, Street, Minor, and Parrott, ratified and declared in writing the contract of the 12th day of September, 1873, (except that part that had reference to the line of road between the towns of Stratford and Derby,) to be a binding contract between Mr. Hungerford and the corporation. The ratification was annexed to the contract, and is as follows: "The New York & Eastern

Railway Company having been, since the execution of the foregoing contract, duly and legally organized, and the committee named herein having been appointed by the directors of said company and duly authorized to make this agreement, it is hereby agreed by and between the said committee and said Henry Hungerford that the foregoing contract is ratified and declared to be a binding contract upon the parties except as to that part of the same which provides for the procuring of land for the right of way from Stratford to Derby, which is not to be procured by said Hungerford. The amount for that reason to be deducted from the compensation of \$500,000 in the paid up capital stock of said company, to be paid to said Hungerford or his assigns, is to be a matter of further negotiation and settlement between the parties; and if they cannot agree it is to be fixed upon in the same manner as agreed in said contract for the settlement of any differences or disagreements that may arise between the parties." The corporation preferred its petition to the general assembly at the May session, 1874, praying for liberty to erect a railroad bridge across the Housatonic river as a part of its line, but the petition was dismissed, and liberty to build the bridge was denied. After the company became duly incorporated, Mr. Hungerford continued in the business of procuring contracts from other owners of land, and renewals of those contracts which had been previously made; and he claimed that he had obtained the right of way for more than 15 miles of the distance of the line in such way that it was ready to be conveyed to the corporation. He claimed to have proved that in and about the obtaining of these contracts he spent more than seven months in actual days' work, with an assistant for the whole time, and paid out more than \$6,000 in cash in the necessary disbursements of the work; and that by reason of the acts and omissions of the company he was prevented from engaging in any other business or occupation from the date of the contract until February 10, 1875. He claimed also that it would not have cost him more than \$100,000 to have procured the entire right of way called for by the contract. For the purposes of the present discussion it must be taken that the several claims were proved, and are true, as they are admitted by the demurrers to the remonstrance. At the hearing before the committee Mr. Hungerford claimed that upon the facts of the case he was entitled to damages—*First*, that for breach of contract by reason of the acts and omissions of the corporation there should be allowed to him as damages a sum equal to the par value in money of the \$500,000 of capital stock of the corporation, less the sums it would have cost him to procure the right of way; or, *second*, that there

should be awarded to him such a proportionate part of the par value in money of the \$500,000 of capital stock, less the cost of purchasing, as the part of the line which he had procured bore to the whole line; or, *third*, that there should be awarded to him a sum equal to the fair value of the services and work he and those under him had performed, and also a sum equal to all the money he had disbursed, and such further substantial damages as he was legally and equitably entitled to for the breach of the contract. The committee overruled each of these claims, and refused to allow any substantial damages as claimed by Mr. Hungerford, and allowed nominal damages only. The ruling and decision of the committee on these claims is the fourth ground of remonstrance. A demurrer to this ground of remonstrance was sustained. This is assigned for error in the reasons of appeal, and presents the main question in the case.

Nominal damages mean no damages at all. They exist only in name, and not in amount. In the quaint language of an old writer, they are "a mere peg to hang costs on."

They are such as are to be awarded in a case where there has been a breach of a contract, and no actual damages whatever have been or can be shown. The facts in connection with the claim of Mr. Hungerford, as found or as admitted by the pleadings, are such as, under most circumstances, would seem to require that more than nominal damages should be allowed. They show that Mr. Hungerford was ready and willing at all times, and able, to perform the contract fully on his part, and that he would have done so except that he was prevented from so doing, and so was prevented from earning the whole sum of \$500,000 in the fully paid up capital stock of the corporation by the acts and omissions and inability of the company. It is a general rule of law that one who violates his contract with another is liable for all the direct and proximate damages which result from such violation. It is a rule so obviously just and so well established by authority that it ought not to be called in question. It is also a rule of law that "in all cases of prevention of performance, where the plaintiff has been deprived by the defendant of the benefit of the contract, the plaintiff is entitled to recover what he has lost by the act of the defendant." Add. Cont. 881. See, also, Chit. Cont. (11th Ed.) 1323, note *b*; 1 Sedg. Dam. (7th Ed.) 473. In *Wells v. Abernethy*, 5 Conn. 227, this court laid down the same rule. Judge HOSMER, in giving the opinion, said: "If the party omits to do what he stipulated, it is just, as a reasonable substitute, that he should pay the precise value of the thing he contracted to do." "When a contract has been violated, the

Plaintiff
entitled to
substantial
damages.

compensation of the party complaining of the violation should be the value of the contract. He has been deprived of his contract, and he should have, in lieu thereof, its value. *Wake-man v. Wheeler & W. Manuf'g Co.*, 101 N. Y. 211. In *Taylor v. Bradley*, 39 N. Y. 129, Judge WOODRUFF, in the decision said: "The only rule that will do justice to the parties is that the plaintiff is entitled to the value of his contract. He was entitled to its performance. It is broken. He is deprived of his adventure. What was the opportunity which the contract had apparently secured to him worth? To reap the benefit of it he must incur expense, submit to labor, and the appropriation of his stock. His damages are what he has lost by being deprived of his chance of profit." See, also, *Brooks v. Hubbard*, 3 Conn. 58; *Dennis v. Maxfield*, 10 Allen (Mass.), 138; *Chamberlin v. Scott*, 33 Vt. 80; *Stevens v. Lyford*, 7 N. H. 360, 365; *Mitchell v. Gile*, 12 N. H. 395; *Smith v. Smith*, 2 Johns. (N. Y.), 235, 243; *Gleason v. Pinney*, 5 Cow. (N. Y.), 152; *Planche v. Colburn*, 5 Car. & P. 58; *Inchbald v. Western, etc. Plantation Co.*, 17 C. B. (N. S.), 733. Many other authorities are cited in the notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. (7th Ed.) 53.

The committee in one part of his report says: "I do not find that from the 27th day of April, 1874, (the date of the ratification,) the said Hungerford suffered any special loss or damage from the acts, omissions, and inability of said corporation; and, as he makes no special claim for damages from the time of the ratification of the contract until the failure of said corporation to obtain a grant to build said bridge, at which time it became apparent that the company could not carry into effect the provisions of their contract with him, I find that he necessarily suffered but little loss or damage after that time, and therefore find that he is entitled to nominal damages." In another place he says: "I do not find said ratification of said contract in terms to be a ratification of the acts and doings of Mr. Hungerford in procuring said contracts from individuals for the right of way, nor do I find that the New York & Eastern Railway Company ever ratified said contracts in any other manner." It is evident from these extracts from his report that the learned committee was of the opinion that in estimating damages no regard whatever was to be paid to the contracts which Mr. Hungerford had obtained prior to the ratification by the corporation of its contract with him. In this respect we think he failed to give the full and proper effect to the ratification. The corporation, by its ratification of the contract previously made by its promoters, became liable for everything that had

Estimation of
damages—Ser-
vices prior to
ratification.

been done pursuant to it. That contract was made by the promoters to aid the inchoate corporation, and it was a reasonable means for the carrying out of the authorized purposes of the company. It required Mr. Hungerford to commence at once to procure land. He did so commence, using forms of contracts provided by Mr. Olmstead, the president. The directors acted with full knowledge of all the facts, and with such knowledge they "ratified" the contract. That word itself means the adoption of a previously formed contract. Ratification relates back to the execution of the contract, and renders it obligatory from the outset. By the nature of the act the party ratifying becomes a party to the contract, and is, on the one hand, entitled to all its benefits, and, on the other, is bound by its terms. *Edwards v. Grand Junction R. Co.*, 1 Mylne & C. 650, 672; *Negley v. Lindsay*, 67 Pa. St. 217, (SHARSWOOD, J.); And, Law Dict. *in verbum*; *Low v. Connecticut & P. R. R. Co.*, 45 N. H. 370; *Stanley v. Chester & B. R. Co.*, 3 Mylne & C. 773. A corporation has power, when fully organized, to ratify a contract made by its promoters when it is one within the purposes for which the corporation was organized, and appears to be a reasonable means for the carrying out of those purposes. *Mor. Priv. Corp.* § 549; *Touche v. Metropolitan R. Warehousing Co.*, L. R. 6 Ch. App. 671. And the ratification makes the contract in all respects what it would have been if the requisite power had existed when it was entered into. *Whitney v. Wyman*, 101 U. S. 397; *Ang. & A. Corp.* § 304; *Church v. Sterling*, 16 Conn. 388; *Fleckner v. Bank of U. S.*, 8 Wheat. (U. S.), 363, (STORY, J.)

The fifth ground of remonstrance states that for the purpose of showing that Mr. Hungerford was entitled to no damage, even if the contract had been broken by the company, the company introduced Mr. H. R. Parrott, one of its directors and its secretary, as a witness of whom it asked: "Was it practicable or possible to obtain subscriptions for the road after the legislature refused to give you a charter for the bridge?" To this question Mr. Parrott answered: "It was utterly impossible to get subscriptions to stock or to raise money to build the road." This question and answer were admitted against the objection of Mr. Hungerford. The bearing and effect of this testimony is made clear by that portion of the committee's report where he finds "that said company did not * * * cause their road to be laid out and accepted by the railroad commissioners; that they did not lay out and expend a sufficient sum, as required by statute, to enable them to continue their corporate existence;

Evidence—
Possibility of
getting sub-
scriptions to
stock.

and that they suffered their corporate rights to expire, in consequence thereof, on the 10th day of February, 1875. Nor did they issue any stock certificates, although a small portion of stock had been subscribed for by individuals, which stock has never had any market value, and no value whatever except as assets in the hands of the receiver to pay the past liabilities of said railroad company." We think the admission of this evidence was error. It was allowing the corporation to take advantage of its own acts and omissions to escape liability on its own contract. The statute under which the corporation was organized required that before the certificate of its organization was filed there must be *bona fide* subscriptions to its stock of at least \$5,000 for each mile of its proposed line,—in this instance, 46 miles; so that this railroad corporation must have had at least \$230,000 of *bona fide* subscriptions to its capital stock for which it could have issued certificates, and which must have been worth their full face value. How much more stock had been subscribed for by individuals does not appear. That no stock was issued was because the corporation decided not to issue any, and that is the best possible reason why it never had any market value. As none was issued, clearly it could never have had any market value, and no value whatever except as assets in the hands of the receiver to pay the past liabilities of the corporation.

The corporation was organized for the purpose of building and operating a railroad from Greenwich to New Haven,—presumably for the profit of its corporators and promoters. It may be conceded that the success of the scheme depended largely upon obtaining permission to bridge the Housatonic river. It may be granted, further, that, having failed to obtain such permission, the directors acted prudently, so far as their enterprise was concerned, in permitting their corporate existence to expire. But neither of these considerations could absolve the corporation from its contract. It had stipulated with Mr. Hungerford to pay him \$500,000 in the fully paid up shares of its capital stock. It could not, without violating that contract, permit its corporate existence to expire, or omit to issue its stock. The permitting itself to become disabled from performing the contract on its part was a violation of the agreement with Mr. Hungerford. When a party enters into an agreement which can only take effect by the continuance of a certain existing state of things, there is an implied engagement on his part that he will not by any act or omission of his own do anything to put an end to that state of circumstances under which alone the agreement can be operative. *Stirling v. Maitland*, 5 Best & S. 840. The case of *Inchbald v. Western, etc. Plantation Co.*, 17 C. B. (N.

S.) 733, is clearly in point. The plaintiff was a broker, and sued to recover the sum of £400 sterling. The defendant was a stock company, formed to carry on the business of raising coffee, tea, and cinchona, and had entered into negotiations with one Lascelles to purchase of him a plantation in the East Indies, on which to carry on the business. The defendant then agreed with the plaintiff to pay him £100 down and £400 afterwards, when all the shares of the defendant should be placed, and in consideration thereof the plaintiff undertook to place all the shares of its stock. The plaintiff procured some shares to be subscribed for, but, before he had procured the whole, Mr. Lascelles refused to convey the plantation to the defendant. Thereupon the defendant's directors decided to abandon the enterprise, wound up the corporation, and returned to the stockholders who had subscribed the deposits they had paid. It was held that, although the scheme of the defendant was rendered impracticable by the refusal of Mr. Lascelles to convey the plantation, yet, as the winding up of the corporation was the voluntary act of the defendant, and as thereby they had prevented the plaintiff from earning the whole £400, they were liable to him for that amount, less the risk he had; and the court assessed the damages at £200. See, also, 2 Pars. Cont. (5th Ed.) 523; Chit. Cont. (11th Ed.) 89, 1059; *Planche v. Colburn*, 5 Car. & P. 58; *McIntyre v. Belcher*, 14 C. B. (N. S.) 653.

The sixth ground of remonstrance is that, "on the hearing, said company, for the purpose of showing that the performance of said Hungerford's contract depended upon said company's obtaining the right to bridge the Housatonic river, and that in the event of a failure to obtain such right, said contract was to be terminated, asked said Parrott: 'Did Mr. Hungerford know that the success of the road depended upon getting the bridge?' In answer, the witness said: 'I say Mr. Hungerford knew that the success of the road depended upon getting the bridge, because I talked with him on that very subject over and over again.' Mr. Hungerford duly objected to this evidence." We think it was error to admit this testimony. The contract between Mr. Hungerford and the company was in writing, and all parol understandings and agreements were merged in it. Besides, the contract expressly exempted Mr. Hungerford from liability for procuring charters for drawbridges over navigable waters. For the reasons here given, we think the superior court erred in accepting the report of the committee. The other judges concurred.

Written contract—Parol evidence.

Liability of Corporation on Contracts of Promoters.—See *Munson v. Syracuse, etc. R. Co.*, (N. Y.), 29 Am. & Eng. R. Cas. 377; *Perry v. Little Rock, etc. R. Co.*, (Ark.), 25 *Id.* 44; *Braddock v. Philadelphia, etc. R. Co.*, (N. J.), 16 *Id.* 436; note 9 *Id.* 629.

ALLEMONG *et al.*

v.

SIMMONS *et al.*

(124 Indiana, 199.)

Director—Power to Make Contract.—Although a director of a railroad company is the owner of a majority of its stock, he has no authority to bind the company by a contract for the construction of its road.

Same—Estoppel of Corporation.—Where a railroad company has contracted with one of its directors for the construction of its railroad, the company is not estopped to deny the validity of a contract entered into in its name by such directors with third persons to construct the road, if it had no knowledge of such contract at the time when the work was done thereunder, although it may have been garnished in a suit against such third persons and estimates for one month furnished by the director's engineer showed that the contractors had done work on the railroad.

APPEAL from Superior Court, Marion County.

Action by Albert W. Allemong and others against James A. Simmons and another. A writ of garnishment was issued and served upon the Louisville, New Albany & Chicago R. Co., and the Chicago & Indianapolis Air Line R. Co., and John Henderson and others became parties thereunder.

McMaster & Boice, for appellants.

Geo. W. Friedley and *George R. Eldridge*, for appellees.

BERKSHIRE, J.—This action was brought by the appellants, Allemong, Baer and Henking, upon an indebtedness alleged to be due from the appellees Ayleshire and Simmons. At the same time proceedings in attachment were instituted and proceedings in garnishment commenced against the appellees the Louisville, New Albany & Chicago Railway Company and the Chicago & Indianapolis Air Line Railway Company. The other appellants became parties to the action as claimants, filing under the proceedings in attachment. Issues were joined in the main action, and also in the ancillary proceeding. There was a jury trial, and a general verdict returned by the jury against the appellees Simmons and Ayleshire in both the main action and the proceedings in attachment, and in favor of the appellees the said corporations. At the same time the jury returned certain interrogatories which had been propounded to them, together with their answers thereto. The appellants moved

for judgment upon the answers to the said interrogatories, notwithstanding the general verdict in favor of the said Louisville, New Albany & Chicago Railway Company, and the said Chicago & Indianapolis Air Line Railway Company, which motion the court overruled, and the appellants excepted. The appellants then moved for a new trial, which motion was overruled, and they reserved exceptions. There were some other motions made by the appellants, but, as the whole ground is covered by the questions presented by the motion for a judgment *non obstante* and for a new trial, we need not notice them further. From the judgment rendered at special term the appellants appealed to general term, and assigned error, and, the judgment at special term having been affirmed in general term, they prosecute this appeal, and assign as error the ruling of the court in general term affirming the judgment at special term.

The following are the interrogatories propounded to the jury, together with the answers to the same:

"THE PLAINTIFFS' INTERROGATORIES.

"The appellants then asked to submit the following interrogatories in case the jury made a general verdict, which were submitted to the jury, and answered Special Findings. as follows:

"(1) Was not the Chicago & Indianapolis Air Line Railway Company incorporated under the laws of the state of Indiana on the 27th day of January, 1880? Answer. Yes.

"(2) Was not the railway company mentioned in the preceding question consolidated with the Chicago & Dyer Railroad Company, a corporation of the state of Illinois, on the 20th day of January, 1880, under the name and style of the 'Chicago & Indianapolis Air Line Railway Company,' by articles of consolidation? A. Yes.

"(3) Was not Henry Crawford a director in said consolidated company last named? A. Yes.

"(4) Was not Henry Crawford the owner of five-sixths of the stock of said company, and, if not, how much did he own? A. Yes.

"(5) Did not the defendants James A. Simmons and Joseph P. Ayleshire have a contract for the construction of the roadway of said consolidated company from Delphi, Carroll county, Ind., to Indianapolis, Marion county, Ind., purported to be executed in the name of said Chicago & Indianapolis Air Line Railway Company, by Henry Crawford on the one part, and the said Simmons and Ayleshire on the other part, bearing date June 28, 1881? A. Yes.

"(6) Did not said Simmons and Ayleshire believe in good faith that said contract was what it purported to be, namely,

a contract between them and said Chicago & Indianapolis Air Line Railway Company? A. Yes.

"(7) Did not said Simmons and Ayleshire work upon the construction of said roadway believing in good faith that it was a valid and subsisting contract between them and said company, and, so believing, were not said Simmons and Ayleshire at work upon the construction of said roadway under said contract in and during the month of May, 1882? A. Yes.

"(8) Were not the estimates made out in the name of said company, showing the work of construction to have been done by said Simmons and Ayleshire for said company, and was not that the way in which their construction accounts were stated? A. No.

"(9) Was not the estimate for the work done by said Simmons and Ayleshire in the construction of said roadway for the month of May, 1882, made out in the form and manner stated in the last preceding question? A. Yes.

"(10) Did not said estimate for the month of May, 1882, show said company to be indebted to said Simmons and Ayleshire in the sum of \$6,857.17, after deducting the five per cent. reserved by said company? A. Yes.

"(11) Did not said statement show the reserve of five per cent. on the cost of construction retained in the hands of said company to be \$11,996.22 at that time? A. Yes.

"(12) Were not these amounts the sums then due to said Simmons and Ayleshire upon the work of construction prior to and during the month of May, 1882? A. Yes.

"(13) Was not the Chicago & Indianapolis Air Line Railway Company consolidated with the Louisville, New Albany & Chicago Railway Company, August 10, 1881, the name of the consolidated company being the Louisville, New Albany & Chicago Railway Company? A. Yes.

"(14) Was not Marshall Morris the chief engineer of said consolidated company, and superintendent of the construction of the roadway thereof between said Delphi and Indianapolis, from March, 1882, until after the completion of the same? A. Yes.

"(15) Was not said Morris acting in that capacity prior to and during the month of May, 1882, and for some time subsequent thereto? A. Yes.

"(16) Did not said Morris see said contract for construction, purporting to be between said Simmons and Ayleshire and said Chicago & Indianapolis Air Line Railway Company, and did he not know that said Simmons and Ayleshire were working thereunder? A. Yes.

"(17) Did not said Morris have the knowledge referred to

in the previous question, prior to and during the month of May, 1882, and did not he see the estimates made before and for said month, and subsequent thereto? A. Yes.

"(18) Did not the Louisville, New Albany & Chicago Railway Company accept the work done as aforesaid by said Simmons and Ayleshire, after said Morris had seen said contract and said estimates of said work done upon said roadway? A. Yes.

"(19) Was not said Louisville, New Albany & Chicago Railway Company served with summons as garnishee in this action on the 15th day of May, 1882? A. Yes.

"(20) Is there not due from the defendants Simmons and Ayleshire to the several plaintiffs herein sums as follows:

To Albert W. Allemong, Louis Bær, and Frederick C. Henking..	\$1,334 10
To John and Edward Henderson.....	1,594 92
To John Doges and William H. Andrews.....	1,818 11
To John T. Holliday, Frank J. Holliday, and Wm. H. Harrey..	690 12
To Sylvanus M. Brandyberrry.....	97 96
To James M. Kerr.....	832 76

"A. Yes.

"(21) Were not the defendants Simmons and Ayleshire non-residents of the state of Indiana at the time of the commencement of this action, and are they not still such non-residents? A. Yes.

"THE DEFENDANT'S INTERROGATORIES.

"The Louisville, New Albany & Chicago Railway Company, defendant, asked the following interrogatories, which were submitted, and answered as follows:

"Interrogatory No. 1. Do you find from the evidence that the New Albany Company paid Simmons, Ayleshire & Co. any money for work done by them on the Air Line, after the consolidation? Answer. No.

"Int. No. 2. If you answer the first interrogatory, 'Yes,' then state the amount paid and by whom and the date of such payment. A. ———.

"Int. No. 3. Do you find from the evidence that the New Albany Company had any dealings or transactions with Simmons, Ayleshire & Co. after the consolidation, as contractors, other than through Henry Crawford as the original contractor? A. No.

"Int. No. 4. If you answer interrogatory No. 3, 'Yes,' then state what such dealings and transactions were, with whom had, and when, as shown by the evidence. A. ———.

"Int. No. 5. Do you find from the evidence that the New Albany Company paid all money it paid out after the consolidation, for constructing the Air Line road, to Henry Crawford? A. Yes.

"Int. No. 6. If you answer the last interrogatory in the negative then state from the evidence to whom said New Albany Company paid such moneys, other than Crawford, after the consolidation, and the amounts and dates of such payments. A. ———"

"Int. No. 7. Do you find from the evidence that the New Albany Company settled in full with Henry Crawford for all work done in constructing the Air Line road? A. Yes."

We do not think the court erred in overruling the said motion. It is a well established rule of this court that, if there is any reasonable hypothesis upon which the general verdict and the answers returned by the jury to interrogatories propounded to them can be reconciled, the general verdict will control the judgment of the court. *Redelsheimer v. Miller*, 107 Ind. 485; *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460, 33 Am. & Eng. R. Cas. 81; *Grand Rapids & I. R. Co. v. Ellison*, 117 Ind. 234, 39 Am. & Eng. R. Cas. 480. We observe no inconsistency between the general verdict and the answers to the interrogatories. The answers to the interrogatories, as will appear further on, when we come to discuss the questions arising upon the action of the court in overruling the motion for a new trial, disclose no indebtedness existing between the appellees Simmons and Ayleshire, and the appellees the said corporations. It must be conceded that the appellee the said Louisville, New Albany & Chicago Railway Company, after the consolidation, became bound to perform all of the obligations yet to be performed by the other appellee corporation, and liable for the payment of all of its outstanding indebtedness; and if the said appellee the said Chicago & Indianapolis Air Line Railway Company was bound to the performance of the stipulations and obligations as the party of the second part of the contract that had been entered into with Simmons and Ayleshire, then the said appellee the said Louisville, New Albany & Chicago Railway Company became so liable.

But the evidence discloses no such liability on the part of said Chicago & Indianapolis Air Line Railway Company. The contract was executed June 28, 1881, and was signed by Simmons & Co. for themselves, and by Henry Crawford for the railway company. There is not one *scintilla* of evidence to indicate that Crawford had any authority to enter into the contract for the railway company. Upon the other hand the evidence discloses that he had no such authority. It is true, Crawford was one of the directors of the company, and held a majority of the stock, but the existence of these facts

Inconsistency
between spe-
cial findings
and general
verdict.

Power of di-
rector to
make con-
tract.

conferred upon him no power to make contracts for the corporation. It could only be bound by the action of its board of directors. The board could have conferred on Crawford this power, but there is no evidence that it had done so. Crawford, as one of the directors had no more authority or power than any other director. The board consisted of five members, and three constituted a quorum; less than three could make no binding contract, for the corporation. *Harris v. Muskingum Manuf. Co.*, 4 Blackf. (Ind.) 267; *Gashwiler v. Willis*, 33 Cal. 11. Section 9 of the act under which the Chicago & Indianapolis Air Line Railway Company was organized provides that the directors shall have power to make by-laws for the management and disposition of stock, property, and business affairs of the company, not inconsistent with the laws of the state of Indiana, and of prescribing the duties of the officers and servants that may be employed, and for the appointment of all officers for carrying on the business, within the object and purpose of such company. Rev. St. 1881, § 3897. This of course, means a majority of the directors. There is no provision in the statute giving to the stockholders any such power. *Mor. Priv. Corp.* §§ 243-337; *Pierce, R. R.* 30. The contract which Simmons and Ayleshire executed with Crawford was the mere personal engagement of Crawford with the said parties. *Tileston v. Newell*, 13 Mass. 405; *Harris v. Muskingum Manuf. Co.*, 4 Blackf. (Ind.) *supra*; *Roberts v. Button*, 14 Vt. 195; *Wheelock v. Moulton*, 15 Vt. 519, 522.

There is nothing in the evidence tending to show an estoppel. At the date at which the contract was made with Simmons and Ayleshire the two corporations had each a contract with Crawford to furnish the materials and construct that part of the road covered by the contract with them. There is nothing to indicate that, when the work was done covered by the May estimate of 1882, the corporations, or either of them had knowledge of the contract with Simmons and Ayleshire. It is true the said appellees had been summoned to answer to the proceedings in garnishment, but there was nothing to disclose to the said appellees that Simmons and Ayleshire were looking to them, or either of them, for payment. There is nothing in the estimate to indicate that the work was done or the materials furnished under a contract with the appellee the said Chicago & Indianapolis Air Line Railway Company, or that it was so claimed. The estimate indicates that the materials furnished and work done was in building the line of road owned by the consolidated corporations, but they had the right to suppose that they were chargeable with the materials and work to Craw-

Entoppel.

ford under the contract made with him. The witness Morris, whose deposition was taken by the appellees, but read in evidence by the appellants, testified that the estimates were made by Jackson, Crawford's engineer; and that they came to him, as he supposed, for work done and materials furnished to the said corporations by said Crawford, under his contract with them. Simmons and Ayleshire were bound to a knowledge of the law when they entered into the contract, and to know that Crawford could not bind the corporation without its authority given so to do. The evidence shows that the appellees the said corporations acted in good faith, and paid the party in full with whom they contracted. In their depositions, Lewis, the secretary and treasurer, and Beech, the president, of the consolidated corporations, testify that the said corporations had no contract with Simmons and Ayleshire, and that there was no indebtedness due from the said corporations, or either of them, to the said parties. We have not noticed the instructions complained of. They were more favorable to the appellants than they had the right to ask. The court might, with great propriety, have instructed the jury to find for the appellees the said corporations. We find no error in the record.

Judgment affirmed, with costs.

UNION PACIFIC R. CO.

v.

BOTSFORD.

(U. S. Supreme Court, May 25, 1891.)

Surgical Examination of Injured Person—Power of Court to Order.—In an action for an injury to the person, the courts of the United States have no power to order, on the application of the defendant, and in advance of the trial, that the plaintiff, without his or her consent, submit to a surgical examination as to the extent of the injury sued for.

BREWER and BROWN, JJ., dissenting.

IN error to the Circuit Court of the United States for the District of Indiana.

The original action was by Clara L. Botsford against the Union Pacific Railway Company for negligence in the construction and care of an upper berth in a sleeping car in which she was a passenger, by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concussion of the same, resulting in great suffering and pain to her in

body and mind, and in permanent and increasing injuries. Answer, a general denial. Three days before the trial (as appeared by the defendant's bill of exceptions) "the defendant moved the court for an order against the plaintiff, requiring her to submit to a surgical examination, in the presence of her own surgeon and attorneys, if she desired their presence; it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner, the defendant at the time informing the court that such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be without any witnesses as to her condition. The court overruled such motion, and refused to make said order, upon the sole ground that this court had no legal right or power to make and enforce such order." To this ruling and action of the court the defendant duly excepted, and after a trial, at which the plaintiff and other witnesses testified in her behalf, and which resulted in a verdict and judgment for her in the sum of \$10,000, sued out this writ of error.

John F. Dillon, for plaintiff in error.

A. C. Harris, for defendant in error.

GRAY, J.—The single question presented by the record is whether, in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent to submit to a surgical examination as to the extent of the injury sued for. We concur with the circuit court in holding that it had no legal right or power to make and enforce such an order. No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge COOLEY: "The right to one's person may be said to be a right of complete immunity; to be let alone." Cooley, Torts, 29. For instance, not only wearing apparel, but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process or execution for debt, or writ of replevin. 3 Bl. Comm. 8; *Sunbolt v. Alford*, 3 Mees. & W. 248, 253, 254; *Muck v. Parks*, 8 Gray (Mass.), 517; *Maxham v. Day*, 16 Gray (Mass.), 213. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the

Court cannot order injured person to submit to examination.

body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order of process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. In former times, the English courts of common law might, if they saw fit, try by inspection or examination, without the aid of a jury, the question of the infancy or of the identity of a party; or on an appeal of mayhem, the issue of mayhem or no mayhem; and, in an action of trespass for mayhem, or for an atrocious battery, might, after a verdict for the plaintiff, and on his motion, and upon their own inspection of the wound, *super visum vulneris*, increase the damages at their discretion. In each of those exceptional cases, as Blackstone tells us, "it is not thought necessary to summon a jury to decide it," because "the fact, from its nature, must be evident to the court, either from ocular demonstration or other irrefragable proof;" and therefore, "the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone." The inspection was not had for the purpose of submitting the result to the jury, but the question was thought too easy of decision to need submission to a jury at all. 3 Bl. Comm. 331-333. The authority of courts of divorce, in determining a question of impotence as affecting the validity of a marriage, to order an inspection by surgeons of the person of either party, rests upon the interest which the public as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction, and is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts, not proceeding in any respect according to the course of the common law. *Briggs v. Morgan*, 2 Hagg. Const. 324, 3 Phillim. Ecc. 325; *Devanbagh v. Devanbagh*, 5 Paige, (N. Y.). 554; *Le Barron v. Le Barron*, 35 Vt. 365. The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.

The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a

widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and if she was, to keep her under proper restraint till delivered. 1 Bl. Comm. 456; Bac. Abr. "Bastard, A." In cases of that class, the writ has been issued in England in quite recent times. *In re Blackmore*, 14 Law 1 Ch. 336. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and conditions of the people. So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history. The most analagous cases in England that have come under our notice are two in the common bench, in each of which an order for the inspection of a building was asked for in an action for work and labor done thereon, and was refused for want of power in the court to make or enforce it. In one of them, decided in 1838, counsel moved for an order that the plaintiff and his witnesses have a view of the building, and an inspection of the work done thereon; and stated that the object of the motion was to prevent great expense, to obviate the necessity of calling a host of surveyors, and to avoid being considered trespassers. Thereupon one of the judges said, "Then you are asking the court to make an order for you to commit a trespass;" and Chief Justice TINDAL said: "Suppose the defendants keep the door shut; you will come to us to grant an attachment. Could we grant it in such a case? You had better see if you can find any authority to support you, and mention it to the court again." On a subsequent day, the counsel stated that he had not been able to find any case in point, and therefore took nothing by his motion. *Newham v. Tate*, 1 Arn. 244, 6 Scott, 574. In the other case, in 1840, the court discharged a similar order, saying: "The order, if valid, might, upon disobedience to it, be enforced by attachment. Then it is evidently one which a judge has no power to make. If the party should refuse so reasonable a thing as an inspection, it may be a matter of argument before the jury, but the court has no power to enforce it." *Turquand v. Strand Union*, 8 Dowl. 201, 4 Jur. 74. In the English common law procedure act of 1854, enlarging the powers which the courts had before and authorizing them, on the application of either party, to make an order "for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the in-

spection of which may be material to the proper determination of the question in dispute," the omission to mention inspection of the person is significant evidence that no such inspection, without consent, was allowed by the law of England. Tayl. Ev. (6th Ed.) §§ 502-504. Even orders for the inspection of documents could not be made by a court of common law, until expressly authorized by statute, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party. Tayl. Ev. §§ 1588-1595; 1 Greenl. Ev. § 559.

In the case at bar, it was argued that the plaintiff in an action for personal injury may be permitted by the court, as in *Mulhado v. Railroad*, 30 N. Y. 370, to exhibit his wounds to the jury in order to show their nature and extent, and to enable a surgeon to testify on that subject, and therefore may be required by the court to do the same thing, for the same purpose, upon the motion of the defendant. But the answer to this is that any one may expose his body, if he chooses, with a due regard to decency, and with the permission of the court; but that he cannot be compelled to do so, in a civil action, without his consent. If he unreasonably refuses to show his injuries, when asked to do so, that fact may be considered by the jury as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power. *Clifton v. U. S.*, 4 How. (U. S.), 242; *Bryant v. Stilwell*, 24 Pa. St. 314; *Turquand v. Strand Union*, above cited. In this country, the earliest instance of an order for the inspection of the body of the plaintiff in an action for a personal injury appears to have been in 1868, by a judge of the superior court of the city of New York in *Walsh v. Sayre*. 52 How. Pr. (N. Y.) 334, since overruled by decisions in general term in the same state. *Roberts v. Ogdensburg & L. C. R. Co.*, 29 Hun (N. Y.), 164; *Neuman v. Third Ave. R. Co.*, 50 N. Y. Super. Ct. 412; *McSwyny v. Broadway & S. A. R. Co.*, 7 N. Y. Supp. 456. And the power to make such an order was preemptorily denied in 1873 by the supreme court of Missouri, and in 1882 by the supreme court of Illinois. *Lloyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509; *Parker v. Enslow*, 102 Ill. 272. Within the last 15 years, indeed, as appears by the cases cited in the brief of the plaintiff in error, a practice to grant such orders has prevailed in the courts of several of the western and southern states, following the lead of the supreme court of Iowa in a case decided in 1877. The consideration due to the decisions of those courts has induced us fully to examine, as we have done above, the precedents and analogies on which they

Conflicting
decisions in
the United
States.

rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law. In the state of Indiana, the question appears not to be settled. The opinions of its highest court are conflicting and indecisive. *Kern v. Bridwell*, 119 Ind. 226, 229; *Hess v. Lowrey*, 122 Ind. 225, 233; *Terre Haute & I. R. Co. v. Brunker*, (Ind.) 26 N. E. Rep. 178. And the only statute which could be supposed to bear upon the question simply authorizes the court to order a view of real or personal property which is the subject of litigation, or of the place in which any material fact occurred. Rev. St. Ind. 1881, chap. 2, § 538.

But this is not a question which is governed by the law or practice of the state in which the trial is had. It depends upon the power of the national courts, under the constitution and laws of the United States. The constitution, in the seventh amendment, declares that in all suits at common law, where the value in controversy shall exceed \$20, trial by jury shall be preserved. Congress has enacted that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided," and has then made special provision, for taking depositions. Rev. St. §§ 861, 863 *et seq.* The only power of discovery or inspection conferred by congress is to "require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," and to nonsuit or default a party failing to comply with such an order. Rev. St. § 724. And the provisions of § 914, by which the practice, pleadings, and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court. *Nudd v. Burrows*, 91 U. S. 426, 442; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 300; *Ex parte Fisk*, 113 U. S. 713; *In re Chateaugay Ore & Iron Co.*, 128 U. S. 544 554. In *Ex parte Fisk*, just cited, the question was whether a statute of New York, permitting a party to an action at law to be examined by his adversary as a witness in advance of the trial, was applicable after an action begun in a court of the state had been removed into the circuit court of the United States. It was argued that the object of § 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial, and not to affect this proceeding in the nature of discovery, conducted in accordance with the prac-

Effect of U. S. statutes.

tice prevailing in New York. 113 U. S. 717. But this court, speaking by Mr. Justice MILLER, held that this was a matter of evidence, and governed by that section, saying: "Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof." "It is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel, to extract something which he may use or not as it suits his purpose." "Every action at law in a court of the United States must be governed by the rule or by the exceptions which the statute provides. There is no place for exceptions made by state statutes. The court is not at liberty to adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this." 113 U. S. 724. So we say here. The order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States. The circuit court, to adopt the words of Mr. Justice MILLER, "has no power to subject a party to such an examination as this."

Judgment affirmed.

BREWER, J., (*dissenting*).—Mr. Justice BROWN and myself dissent from the foregoing opinion. The silence of common law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages, in early days, was, compared with later times, limited; and very few of those difficult questions, as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and of the common law courts to compel a personal examination was, in many cases, often exercised, and unchallenged. Indeed, wherever the interests of justice seemed to require such an examination, it was ordered. The instances of this are familiar; and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered. It would be strange that, if the power to order such an examination was conceded in proceedings adverse to the party ordered to submit thereto, it should be denied where the suit is by the party whose examination is sought. In this country the decisions of the highest courts of the various states are conflicting. This is the first time it has been presented to this court, and it is therefore an open question. There is here no

inquiry as to the extent to which such an examination may be required, or the conditions under which it may be held, or the proper provisions against oppression or rudeness, nor any inquiry as to what the court may do for the purpose of enforcing its order. As the question is presented, it is only whether the court can make such an order.

The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the court room, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but, when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case or stays the trial until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries, in order that the jury may be informed thereof by other than the plaintiff and his friends; and that compliance with such an order may be enforced by

staying the trial or dismissing the case. For those reasons we dissent.

Surgical Examination of Plaintiff's Person in Actions for Personal Injuries.

—The decision of the supreme court of the United States in the principal case, as is admitted by Mr. Justice GRAY in the opinion of the majority of the court, is in conflict with a long line of well considered cases. There are but two states in which the courts adopt the rule approved by the federal supreme court, namely, New York and Illinois. In all the other states where the question has arisen, it is held that in actions to recover damages for injuries to the person, the trial court has authority and may in its discretion order the plaintiff to submit to a physical examination of his or her person by physicians, in order that the extent of the injury may be ascertained. The reasons for this rule cannot be expressed in better language or more concisely than in the words of Mr. Justice BREWER in his dissenting opinion. "The end of litigation is justice. Knowledge of the truth is essential thereto."

The pioneer case upon this question is from New York, *Walsh v. Sayre*, 52 How. Pr. (N. Y.), 334. This case admitted of the power of the trial court to order the plaintiff to submit to such an examination. When the question came before the New York supreme court however, this case was in effect overruled, and it is now the rule in New York that the courts have no such authority. *Roberts v. Ogdensburg & L. C. R. Co.*, 29 Hun (N. Y.), 154.

The consideration which the supreme court of Illinois has given of this important question is exceedingly unsatisfactory. The subject is dismissed in an opinion with the assertion that "the court had no power to make or enforce such an order." *Parker v. Enslow*, 102 Ill. 272. This case established the law in Illinois, but in view of the meagre consideration which the court has given the question, it can hardly be considered as authority outside of that state. Later, the question arose in the case of *Chicago & E. I. R. Co. v. Holland*, 122 Ill. 461, 30 Am. & Eng. R. Cas. 590. The trial court had overruled an application for an examination, and this decision was assigned as error. But the court in this case did not seem to think the question was a settled one, CRAIG, J., saying that whether this decision was *erroneous* or not, was a question which it was not necessary there to determine.

The other states in which the question has arisen are principally Western and Southern states, namely, Iowa, Nebraska, Kansas, Missouri, Ohio, Texas, Minnesota, Georgia, Arkansas, Wisconsin and Alabama, and Indiana, with some qualifications. *Schroeder v. Chicago, R. I. & E. R. Co.*, 47 Iowa 375; *Sioux City, etc., R. Co. v. Finlayson* (Neb.), 18 Am. & Eng. R. Cas. 68; *Stuart v. Havens*, 17 Neb. 211; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kans. 466, 10 Am. & Eng. R. Cas. 783; *Sidekum v. Wabash, etc., R. Co.* (Mo.), 30 Am. & Eng. R. Cas. 640; *Owens v. Kansas City, etc., R. Co.* (Mo.), 33 Am. & Eng. R. Cas. 524; *Miami & M. Turnpike Co. v. Bailey*, 37 Ohio St. 104; *Gulf, C. & S. F. R. Co. v. Norfleet* (Tex.), 45 Am. & Eng. R. Cas. 207; *Missouri Pacific R. Co. v. Johnson* (Tex.), 37 Am. & Eng. R. Cas. 128; *International & G. N. R. Co. v. Underwood*, 64 Tex. 463, 27 Am. & Eng. R. Cas. 240; *Richmond & V. R. Co. v. Childress*, 82 Ga. 719, 41 Am. & Eng. R. Cas. 216; *Sibley v. Smith*, 46 Ark. 275; *White v. Milwaukee City R. Co.* (Wis.), 18 Am. & Eng. R. Cas. 213; *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 44 Am. & Eng. R. Cas. 441; *McGuff v. State*, 88 Ala. 147. In Missouri it was originally held that the court had no authority to order the examination. *Lloyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509. But this doctrine was afterward seceded from, and the supreme court of that state is now in line with the weight of authority. See cases cited *supra*.

But the right of the defendant in these jurisdictions to a surgical examination is not absolute. It is well established that where the order for an examination is not necessary for purposes of justice it will not be made. *Lloyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509. The court in all cases exercises a sound, judicial discretion. *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 10 Am. & Eng. R. Cas. 783; *Sidekum v. Wabash, etc., R. Co.*, 93 Mo. 400, 30 Am. & Eng. R. Cas. 640. *McGuff v. State*, 88 Ala. 147. Refusal of the court to order an examination will be presumed to have been made on the ground that under the circumstances, the order ought not to have been granted. *Miami & M. Turnpike Co. v. Bailey*, 37 Ohio St. 104. The court has a discretion in this matter which will not be interfered with unless manifestly abused and where the evidence given is such that a medical examination could not add any information as to plaintiff's previous health, and but little as to her subsequent condition, the ruling of the trial court in refusing the order will not be disturbed. *Owens v. Kansas City, St. J. & C. P. R. Co.*, 95 Mo. 169, 33 Am. & Eng. R. Cas. 524. So, the refusal of the court to order a physical examination is not a ground for reversal, where it appears that during the trial opportunity for such examination was given, and it not appearing that the court room did not furnish all facilities necessary, and that the nature of the examination was not such that propriety would forbid it being made in public. *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 45 Am. & Eng. R. Cas. 207. Nor is it error for the court to refuse to order an examination by physicians who are witnesses for the defendant in the absence of any showing whatever that justice will be promoted thereby, and especially so when the plaintiff submits to an examination by such witnesses in the presence of the jury. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 18 Am. & Eng. R. Cas. 68.

A cause will not be reversed for refusal to order an examination in the absence of a showing that it was necessary to a full presentation of all the facts, and where it was not shown that the plaintiff was unwilling to submit to an examination by a competent person. *International & V. R. Co. v. Underwood*, 64 Tex. 463, 27 Am. & Eng. R. Cas. 240. And it has been held that the trial court should not order the examination by a physician appointed by it when the party is willing to be examined by a competent and disinterested man without such order. *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 45 Am. & Eng. R. Cas. 207. Where the court orders an examination of the plaintiff's person, it ought to appoint either experts of its own selection or such as may be agreed upon by the parties; and it is not error to refuse to compel plaintiff to submit to examination by a physician named by the defendant, to whom he objects. *Missouri Pacific R. Co. v. Johnson*, 72 Tex. 95, 37 Am. & Eng. R. Cas. 128. The selection of the experts is entirely within the discretion of the court. *Alabama G. S. R. Co. v. Hill (Ala.)*, 9 So. Rep. 722.

If the discretion of the court to order the examination is abused by refusing to make such order, where a proper case is clearly made, it is ground for reversal. *Alabama G. S. R. Co. v. Hill (Ala.)*, 44 Am. & Eng. R. Cas. 441. Thus, it is error to refuse to order an examination on the ground that an examination had already been made by plaintiff's physician, who had deposed to the injuries complained of, where the opinions and conclusions of such physician are not concurred in by several other reputable surgeons. *Alabama G. S. R. Co. v. Hill (Ala.)*, 44 Am. & Eng. R. Cas. 441. So, the fact that the plaintiff is a young woman of nervous temperament, and delicate and refined feelings, is not sufficient cause for overruling the motion for a physical examination of her person by physicians, where it appears that her attending physician had already made several examinations, and that no ill consequences would result. *Alabama G. S. R. Co. v. Hill (Ala.)*, 44 Am. & Eng. R. Cas. 441.

In Indiana it is held that if a motion to require the plaintiff to submit to an examination is not supported by any affidavit showing a necessity therefor, nor any belief as to what it would develop, the court may deny the motion. *Terre Haute & I. R. Co. v. Brunker* (Ind.), 22 N. E. Rep. 178.

On refusal of the plaintiff to comply with the order for an examination when properly made, the court may dismiss the action, or refuse to allow the plaintiff to give evidence to establish the injury. *Miami & M. Turnpike Co. v. Bailey*, 37 Ohio St. 104.

The application for the order ought to be made so as not unnecessarily to prolong the trial or to prejudice the plaintiff in proving his case. Hence, where the application is not made until after the close of the plaintiff's evidence in chief, and the commencement of the introduction of the defendant's evidence, and no reason is shown for the delay in making the application, it may be refused on that ground. *Miami & M. Turnpike Co. v. Bailey*, 37 Ohio St. 104.

PULLMAN PALACE CAR CO.

v.

BALLES.

(*Texas Supreme Court, March 13, 1891.*)

Sleeping Car—Occupancy of Berth—Husband and Wife.—Although a husband and wife have the right ordinarily to occupy the same berth in a sleeping car, yet where a husband and wife, travelling in the same car, each contract for one berth, the sleeping car company is not liable for the refusal of the conductor and porter to allow the husband to admit his wife to his berth, although these servants act in an exceedingly rude manner and pull aside the curtains exposing to view the husband and wife undressed.

APPEAL from District Court, Tarrant County.

Percy Roberts and *R. P. Willing*, for appellant.

Capps & Canty, for appellee.

HENRY, J.—This suit was brought by appellee to recover damages. The plaintiff asked judgment for the sum of \$1,950, and on the trial, without a jury, that sum was awarded him. The appellant complains that "the court erred in rendering judgment for the plaintiff against the defendant, because the judgment of the court on the evidence was contrary to the law, and was not supported by the evidence, in this: (1) The evidence showed that defendant's servants, in causing the plaintiff's wife to leave the berth, acted with no personal animosity to plaintiff or his wife, but that they acted in good faith in striving to prevent what they honestly believed to be an infraction of the rules they were appointed to enforce, and the acts and conduct of the plaintiff and his wife were such as to cause the servants of defendant to believe that they were not husband and wife. (2) It was not shown by the evidence that either the plaintiff or his

wife suffered any actual damage, or that the acts of the servants of the defendant caused them any physical suffering, or that they were entitled to exemplary damages. (3) The evidence showed that the wife of plaintiff had no right to occupy the berth she was asked to leave. (4) The judgment was excessive in amount." The plaintiff was the only witness in the cause. His testimony was, in substance, as follows: Plaintiff, his mother, and his wife, were on their way from Kentucky to Texas. Out of St. Louis they took two lower berths in one of defendant's sleeping cars, one for the mother, and one for plaintiff and his wife. The berths were directly opposite each other. All parties went to bed about the same time. Plaintiff's mother was old, and needed assistance in getting to bed, and his wife went over to her berth and assisted her, and, after doing that, she crossed to plaintiff's berth, and, to avoid publicity, she raised the curtains of her husband's berth; and in passing across the aisle from one berth to the other was protected by them from view. There were two sleeping cars attached to the train, and two sets of porters and conductors, who were back and forth from one car to the other. At Walnut Ridge the party left the sleeping car and went into a passenger coach, in which they remained until the train reached Texarkana the next night. Reaching Texarkana about dark, the plaintiff went into the Pullman car to secure berths for his wife and mother and himself. He told the porter that he wanted two lower berths for himself and two ladies, and engaged them opposite each other. He then went back to the passenger coach and carried their valises, etc., into the Pullman car, and returned for his wife and mother, and accompanied them into the sleeper. The conductor came through the car and approached plaintiff's wife and mother, who were sitting together, and his wife paid him for a berth. Plaintiff, during that time, was arranging the valises. The conductor then came to the plaintiff and he paid him for a berth. Plaintiff and the ladies ordered coffee, and, having a lunch in their valises, ate supper together. The plaintiff then went into the smoker, in the back end of the car, where he remained until bedtime—9 o'clock. The porter came around and arranged the berths, and put the valises away, and let the curtains down. Plaintiff's wife assisted his mother to undress, and, while she was assisting her, plaintiff undressed and went to bed. Plaintiff's wife, after she had put plaintiff's mother to bed, went over to plaintiff's berth. She was partly undressed at the time, and had her clothes unfastened. She slipped across under the curtains. The porter then came to plaintiff's berth and pulled the curtains aside and said, "The Pullman Car Company does not

allow such proceedings," and told plaintiff that his wife must leave his berth. Plaintiff told him that the lady was his wife, and the lady in the opposite berth was his mother, and asked him if a man and his wife had not the right to occupy the same berth. He went away and brought the Pullman conductor. The porter stood at one end of the berth, and the conductor at the other, and they took hold of the curtain of the berth, the porter pulling one-half of the curtain aside, and the conductor the other half, exposing plaintiff and wife to view, undressed. The conductor said, "Here, the Pullman Car Company does not allow any such proceeding as this." Plaintiff told him that the lady was his wife, and that they were traveling together; that the night before they slept in the car just in the rear of the one in which they were then traveling, and that the other lady with him was his mother. He said, "Well, that don't go," in a very insolent manner. Plaintiff told him that they thought they had the right to occupy that bed, as they were traveling together. He said, "That's all right, that don't go." Plaintiff told him they had slept together the night before in the other car. He said, "The Pullman Car Company don't allow anything of this kind." Plaintiff then told his wife to go to the other berth with his mother. Plaintiff got up and stayed up nearly all night, being very much hurt and mortified. The plaintiff testified that the porter could not have been personally acquainted with the parties. The conductors and porters of the two sleeping cars came all the way from St. Louis, and the one in the car taken at Texarkana saw plaintiff in the one taken at St. Louis, and, plaintiff testified, could not have avoided seeing him with his wife during the whole trip.

No question can exist with regard to the right of the husband and wife to occupy the same berth in a sleeping car.

At the same time, the proprietors of such conveyances imperatively owe to the traveling public the duty of seeing that men and women who do not occupy to each other that relation shall not occupy the same one. Usually, there need exist no

No breach of
contract—
Company not
liable.

difficulty about preserving and enforcing both the right and the duty. When a berth is contracted for by the husband, either with an express understanding that it is engaged for the joint occupancy of himself and wife, or under circumstances that are not misleading within themselves, the refusal to permit such joint occupancy, without other reason than the difference of sex, and when such refusal would be a breach of contract, would give the injured party a right of action for damages, in which might be considered circumstances of

insult and aggravation attending the breach. In this case, the wife, with the consent of her husband, made a contract for one berth, while he made one for another. Unquestionably, the wife acquired the right to occupy the one for which she paid, and an unexcused expulsion of her from that would have been a breach of contract, for which plaintiff could have recovered damages. Unless she acquired, by contract, the right to occupy, at the same time, two berths, it is evident that the refusal to permit her to occupy the one paid for by her husband would not be a breach of any contract. As it cannot be claimed that the evidence shows a contract for the wife to occupy more than one berth, it results that a case is not shown for the recovery of damages for the breach of a contract. There is no assault or battery; nor is there a cause of action stated for defamation. It may be admitted that there was nothing improper in the conduct of the plaintiff and his wife, when their relationship to each other is considered; and yet it cannot be affirmed that their actions were not, under the circumstances, calculated to excite the suspicion, and arouse the vigilance, of defendant's servants, and make it their duty to investigate the matter, and apply a remedy for the wrong, if one was found to exist. It was a duty which defendant owed to plaintiff and his wife, as well as to the other passengers on the coach, that the investigation should be conducted without rudeness or greater publicity than was absolutely necessary. The evidence indicates that the defendant's servants did not discharge their duty in this manner, but that, on the contrary, they were guilty of great rudeness. Such conduct would properly be considered, and given weight, in estimating the amount of damage, if a cause of action otherwise existed. But we have been unable to find a precedent for holding that there exists in favor of plaintiff a cause of action growing out of the manner alone in which the servants of defendant discharged an apparent duty. We conclude that the facts fail to show a cause of action, and we therefore reverse the judgment, and render one in favor of the appellant.

STAYTON, C. J., (*dissenting*).—Appellee and his wife were passengers, and entitled to transportation; and it is not believed that the fact that the wife may have paid for one berth and the husband for another should have any bearing on the decision of this case, for it cannot be denied that the husband had the right, under his contract with the company, to admit his wife into the berth in which they were, she being a passenger. This being true, the action of the servants of the company violated his right secured by contract when they

compelled her to leave that berth and take another, and this, in my judgment, gave cause of action. In estimating the damage to which appellee would be entitled, a cause of action existing, it would be proper to take into consideration on the one side the rude, unnecessary, and offensive behavior of the company's servants, and on the other the acts of appellee or his wife, tending to induce the belief on the part of the servants that their relation was not that of husband and wife. I think the motion for rehearing should be granted, and, there being no claim that the damages awarded are excessive, that the judgment should be affirmed.

Duty of Sleeping Car Companies to sell Berths.—A sleeping car company has the right to sell a whole section to one person, and no cause of action arises from the refusal of its conductor to sell the upper berth in such section to another passenger, though that berth was in fact unoccupied. Where a berth in a sleeping car has been sold for occupancy to a certain point, no cause of action arises for the refusal of the conductor, before that point is reached, to sell another person a ticket entitling him to such berth from there to the end of the journey. *Searles v. Mann Boudoir Car Co.*, 45 Fed. Rep. 830.

Liability of Sleeping Car Company for Torts of Servants—Discharging Passengers at Place not a Station.—In *Pullman P. Car Co. v. Smith*, (Tex., Dec. 12, 1890), 14 S. W. Rep. 993, it appeared that plaintiff and his wife occupied berths in a sleeping car. At 5 o'clock A. M. the train stopped at a water tank a half mile from their destination. The porter and conductor of the sleeping car awoke them suddenly, and told them they were at the depot. They were hurried off, partially dressed, and the train left them before they discovered where they were. The exposure resulted in injury to the wife's health. *Held*, that the sleeping car company having offered no evidence of the duties of its servants, and the usages and rules in force on its cars, it will be presumed that the conductor and porter were acting within the scope of their employment and that the company was liable. The court said: "While it is true that the contract for carriage was with the railroad company, and not with the defendant, and that the railroad company was under obligations to plaintiff, as a carrier, for which it would have been liable to him for damage if it had failed in its duty, it still remains to be said that the defendant also owed certain duties to the passengers. *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 34 Am. & Eng. R. Cas. 217; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654. The evidence shows that the Pullman car was hauled by the railroad company, and that the porter and conductor on the sleeping car were the servants, and under the control, of the sleeping car company. The record contains no evidence with regard to rules, regulations, or usages relating to the transportation of passengers on such cars. It does show that the defendant, and not the railroad company, received the compensation for and undertook to furnish the sleeping accommodations, and that they at least were under the exclusive control of the defendant. Whatever may be the duty of the railroad company with regard to notifying its passengers, including such as may be in the sleeping car, of its arrival at the station to which they are destined, we are not able to conclude that the servants of the defendant owe no such duty to the sleeping passenger; on the contrary, we think that the obligation to awake and notify the passenger in time for him to prepare to safely and comfortably leave the train at

the point of his destination is directly involved in the contract for the use of the sleeping berth. In this case, the servant of the defendant assumed the discharge of that duty, and from that fact, as well as the failure of the defendant to introduce any evidence explaining what the duties of its servants were, or as to what are the usages and rules in force on its cars, it may properly be presumed that the servant of defendant was acting within the scope of his employment. There can be no doubt that the negligent discharge of the duty resulted in damage to the plaintiff. The judgment is affirmed."

CARPENTER

v.

NEW YORK, NEW HAVEN & HARTFORD R. CO.

(New York Court of Appeals, Second Division, January 14, 1891.)

Sleeping Car—Loss of Passengers' Valuables—Negligence.—A corporation engaged in running sleeping cars, with sections separated from the aisle only by curtains, is bound to have an employe charged with the duty of continually watching the interior of the car while berths are occupied by sleepers. Accordingly, where a passenger's money is stolen from his berth, and it appears that the only employe kept in the car while it ran from New York to Boston, making frequent stops, was a man who acted as conductor, porter and bootblack, the company is liable to an action therefor.

APPEAL from an order of the general term of the court of common pleas in the city of New York reversing a judgment of the general term of the city court, which affirmed a judgment dismissing the complaint on the merits, with costs, entered on an order at the trial term. The defendant, a railroad corporation, is a carrier of passengers over its line between the cities of New York and Boston, and runs sleeping cars, with the usual accommodations. July 6, 1885, the plaintiff paid his fare, and \$1.50 for a berth from New York to Boston, and took passage on a train that left the Grand Central station at half past 10 o'clock in the evening. He was assigned the lower berth in section 10 of the sleeping car "Boston," and went immediately to bed. A colored porter was in charge of the car, to whom the plaintiff gave his passage and sleeping car tickets. He testified that he undressed and placed his pocket book, containing \$40 in money, in his inside vest pocket, and then placed that garment under the pillow next to the window. He slept soundly and without waking until about 6 o'clock in the morning, when the train was near Boston. Seeking his vest, he found it under the pillow next to the passage way, with his pocket book in the pocket, but the money had been stolen. His watch, which was in another pocket of the garment, and about \$3 in silver, in a third pocket,

were not taken. When the plaintiff went to bed the berth over him was occupied by a stranger, but it was unoccupied when he got up. On discovering his loss, he called the porter, and acquainted him with the fact.

Henry W. Taft, for appellant.

Jabish Holmes, for respondent.

FOLLETT, C. J.—Money necessary for the payment of the expense of a journey undertaken, which is carried in the trunk of a passenger, is part of his baggage, and if lost while in the custody of a carrier for transportation, it is liable. *Merrill v. Grinnell*, 30 N. Y. 594; *Fairfax v. New York Cent. & H. R. Co.*, 73 N. Y. 167; 2 Redf. R. R. 59. But carriers do

Liability for
loss of pas-
senger's
money.

not undertake to carry and safely deliver the effects of travelers not delivered into their custody, and it cannot be held that money in a passenger's clothing worn during the day, and placed under his pillow at night, is in the custody of the corporation which carries and furnishes travelers with berths in sleeping coaches. *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267, 28 Am. & Eng. R. Cas. 148; 2 Ror. R. R. 987. The mere proof of the loss of money by a passenger while occupying a berth does not make out a *prima facie* case, and, to sustain a recovery, some evidence of negligence on the part of the defendant must be given. The negligence complained of is that none of the defendant's employes were continually on guard in the car in a position to observe the movements of all persons in the passage way between the sections. A corporation engaged in running sleeping coaches, with sections separated from the aisle only by curtains, is bound to have an employe charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers. *Car Co. v. Gardner*, 3 Penny (Pa.), 78. These cars are used by

Negligence of
company run-
ning sleeping
car.

both sexes, of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by the carriers, and though such companies are not insurers they must exercise vigilance to protect their sleeping customers from robbery. A traveler who pays for a berth is invited and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Considering the compensation received for such services, and the hazards to which unguarded and sleeping travelers are exposed, the rule of diligence above declared is not

too onerous. Did the plaintiff give evidence which would have authorized the jury to have found that the defendant did not discharge this duty to the plaintiff? The car in which the plaintiff rode was constructed with a passage way through the centre, with sections on each side, each section containing two berths. These sections were separated from each other by movable wooden partitions, and from the aisle by two curtains, which were closed when a berth was occupied. At one end of the car was a toilet for ladies, shut off from the passage way by a swinging door. On one side of the other end of the car was a toilet for gentlemen, opposite to which was the porter's closet. A full view of the main aisle could not be had from all parts of the space at the end last described. The train stopped at eight cities, to take up and set down passengers, staying at New Haven twelve minutes, and at Springfield four. The undisputed evidence is that the entire force employed on the sleeper, which ran over an important thoroughfare, and made frequent stops, was one man, who acted as conductor, as porter, and was also engaged for his own profit in blackening the shoes of the passengers. Whether this employe had that part of the sleeper which is for the common use of passengers and the servants of the corporation constantly in view during the trip is not shown by the evidence except inferentially. The facts hereinbefore referred to—that the car ran over an important route, through and stopping at eight considerable cities; that but one person was employed on the car; the services rendered by him for the defendant, and those which he was at least permitted to render to passengers for his own profit—affirmatively appear, and in addition, it may well be presumed that he assisted passengers in entering and leaving the coach at intermediate stations. The existence of these facts was not denied, nor was any explanation of them offered. The defendant gave no evidence. Under the circumstances the evidence was sufficient to put the defendant to proof of the care which it took of the occupants of the sleeper on this trip, and, in the absence of any explanation on its part, it was sufficient to require the question whether the loss was caused by the defendant's negligence to be submitted to the jury. The order should be affirmed, and judgment absolute rendered against the appellant with costs. All concur.

Liability of Sleeping Car Company for Loss or Theft of Passenger's Effects
—See *Pullman P. Car Co. v. Lowe* (Neb.), 40 Am. & Eng. R. Cas. 637, note 644 and authorities cited.

CHICAGO, ST. LOUIS & NEW ORLEANS R. CO.

v.

PULLMAN SOUTHERN CAR CO.

(130 *United States*, 79.)

Contract Between Sleeping Car Company and Railroad Company—Loss by "Accident or Casualty"—Fire.—A railroad company is liable for the loss of sleeping cars by fire, originating from a cause unknown, under a contract with a sleeping car company which owns such cars, by which the railroad company running them assumed responsibility for damages to the cars occasioned by "accident or casualty."

Same—Effect of Collection of Insurance by Sleeping Car Company.—The collection by a sleeping car company of the insurance money for cars destroyed by fire while in the possession of a railroad company liable for such destruction, does not affect or impair the right of the sleeping car company to recover the amount of the loss according to the contract with the railroad company. Upon payment of the loss, or to the extent of any payment by them on account of the loss, the insurance companies were subrogated to the rights of the insured, and could, in his name or in their joint names, maintain the action against the railroad company for indemnity.

Same—Stipulation for Exclusive Rights—Restraint of Trade—Public Policy.—A stipulation in a contract between a sleeping car company and a railroad company, that the former shall have the exclusive right for fifteen years to furnish drawing room and sleeping cars for the railroad company's use, does not render the contract void as being in general restraint of trade, or against public policy. The contract is to be interpreted in view of the condition implied by law, that the sleeping car company should furnish cars not only adequate and safe, but sufficient in number for the use of the public travelling over the lines of the railroad company.

Same—Destruction of Car in Railroad Company's Yard—Liability of Railroad Company Under Contract.—Under this contract, the sleeping car company was to place a designated number of cars at the disposal of the railroad company, which became responsible for damages to such cars while they were on its road or in its shops undergoing repairs. *Held*, that the railroad company is liable for the destruction by fire of a car which had a few hours before come from active service on the road, and which had been placed in the railroad company's yard awaiting a trip the following day.

Same—Liability for Destruction of Car in Exclusive Possession of Sleeping Car Company.—The railroad company was not responsible for the loss of a car which at the time of the fire, was in the exclusive possession of the sleeping car company, namely, in a shop set apart to it by the railroad company for the purpose of making repairs; such car when burned not being subject to be used by nor under the supervision of the railroad company.

IN error to the Circuit Court of the United States for the Eastern District of Louisiana.

This action was brought by the Pullman Southern Car Company to recover from the Chicago, St. Louis & New Or-

leans Railroad Company the damages alleged to have been sustained on account of the destruction by fire of two of the plaintiff's sleeping cars, the Great Northern and the Louisiana, while on the premises of the defendant. There was a verdict and judgment for the sum of \$19,000, with interest from September 29, 1886, the date of judicial demand, at the rate of 5 per cent. per annum until paid, with costs. The assignments of error relate entirely to instructions given on behalf of the plaintiff, and to the refusal to give instructions asked by the defendant.

The action is based upon a written agreement between these corporations, dated April 5, 1879, showing that the business of the plaintiff was to operate drawing room and sleeping cars which it hired, under written contracts for a term of years, to be used and employed on and over the lines of railway companies, receiving therefor income and revenue by the sale to passengers of seats, berths, and accommodations therein; and that the defendant was desirous of availing itself of their use, on its own route, and also of connections, by means of such drawing room and sleeping cars, with other railroads over which the plaintiff was running its cars. In order to effect the objects of the parties it was, among other things, agreed as follows:

(1) The plaintiff was to furnish drawing room and sleeping cars "sufficient to meet the requirements of travel," on and over the defendant's railway, and such roads as the latter then or thereafter controlled as owner, lessee, or otherwise; the cars so furnished to be satisfactory to the general manager or superintendent of the railroad company, and to be in part certain named cars, 10 in number, among which were the Louisiana and the Great Northern, then operated on the defendant's lines. (2) Each of the plaintiff's cars was to be manned, at its own cost, by one or more of its employes, as might be needful for the collection of fares and the comfort of passengers; such employes to be subject to the rules and regulations established by the defendant for its own employes. (3) "In consideration of the use of the aforesaid cars," the defendant was to haul them on passenger trains on its own line of railroad, and on passenger trains on which it might, by virtue of contracts or running arrangements with other roads, have the right to use them, "in such manner as will best accommodate passengers during the use of said cars." (4) By article sixth of the agreement, all necessary lubricating material, ice, fuel, and material for lights were to be supplied, and the washing and cleansing of the cars furnished under the contract to be done, by the defendant at its expense, which should also renew and replace, as

often as necessary, links, pins, bell cords, and couplings for air brake hose, without charge to the plaintiff. (5) The plaintiff was to keep the cars furnished under the contract in good order and repair; renew and improve them, when necessary, at its own expense; keep them up to the average standard of the best and most approved sleeping cars on any road using an equal number of cars, "excepting repairs and renewals provided for in article sixth of this agreement, and such as are made necessary by accident or casualty, it being understood that the railway company shall repair all damages to said cars of every kind occasioned by accident or casualty during the continuance of this contract, except that the Pullman Company assumes all responsibility for any loss or damage occurring to said cars arising from defective heating apparatus or lights furnished by it." (6) As proper compensation for the maintenance of the running gear and bodies of the cars, the defendant was to pay plaintiff "three cents per car per mile for every mile run by said cars upon the road of the railway company or upon the roads of other companies, by direction of the officers of the railway company, while in service under this contract;" and at all times, when requested by the plaintiff, to make promptly such repairs to the cars furnished under the contract as might from time to time become necessary, and, without request, make such repairs as were required "to insure their safety, rendering bills monthly to the Pullman Company for repairs to cars, and charging for the same only the actual cost of material and labor expended on such repairs, with an addition of ten per cent. to cover general expenses, all settlements and payments for mileage and repairs to be made monthly between said companies." (7) Whenever the revenue from sales of seats and berths equalled an average of \$7,500 per car per annum upon the number of cars furnished under the contract, then, and while such revenue continued, the defendant should not pay mileage for any car so furnished; the plaintiff, in such case, to bear the expense of all repairs and improvements to its cars, "except such repairs as are rendered necessary by accident or casualty, and such as are provided for in article sixth of this agreement, which shall be made by the railway company, as herein before mentioned." (8) The plaintiff was to have the exclusive right, for a term of 15 years from the date of the agreement, to furnish drawing room and sleeping cars for the defendant's use on all its passenger trains on roads then or subsequently controlled or owned by it, and on roads over which it had the right to run such cars; the defendant not to "contract with any other party to run said class of cars on and over said lines of road during said pe-

riod of fifteen years." (9) In case either party failed to cleanse or repair any of the cars, according to the conditions of the agreement, and the party so in default should neglect and refuse to perform its agreement in this respect within a reasonable time after notice of such default, the other party had the right to cleanse and make or cause to be made all necessary repairs and renewals to said cars, at the cost of the party in default. (10) If either party failed, at any time, to keep and perform its covenants, as set forth in the agreement, the one not in default, after the expiration of a reasonable time from the service of written notice of such default, was at liberty to declare the contract at an end. (11) The defendant was given the option to terminate the contract at the end of five, eight, or eleven years, upon written notice to the plaintiff, served six months before the day fixed for such termination; and, if the contract was so terminated, without default upon the part of the plaintiff, the defendant was required to purchase the cars and equipments of the Pullman Company "then in use, or assigned and accepted for use," under the contract, or such interest therein as the defendant may not have previously acquired under the provisions of this contract, "at the actual cash value of the same," with the right to use them without charge for patent rights for their interior arrangements. For the purposes of the option given to terminate the contract, it was agreed "that the cars now [then] running on said railroad, and which should form part of the cars and equipments to be furnished under this contract, together with such additional cars and equipments as may hereafter be assigned to the railway company, shall be appraised," etc. (12) The taxes upon all cars furnished to the defendant by the plaintiff were to be paid equally by the parties.

It was in proof that at the time of the fire the cars Great Northern and Louisiana were insured for the plaintiff; that before the commencement of this action the insurance companies paid to it, in full settlement of the loss and damage, the sum of \$19,000; and that this action is prosecuted under a written agreement, between the plaintiff and the insurance companies, that it should be conducted jointly by their counsel, and the amount recovered by suit, settlement, or compromise, equally divided between them.

The ten cars mentioned in the agreement of April 5, 1879, were furnished to the defendant, and were used on its road. Subsequently to that date, the plaintiff having complained of the manner in which its cars were repaired at the defendant's shops in McComb City, on its road about 105 miles above New Orleans, the latter, by its president, suggested that the

plaintiff repair its own cars. Thereupon, in order to facilitate such repairing, a part of the passenger car depot shed of the defendant in New Orleans was set apart to the exclusive use and control of the plaintiff, which, at its own expense, fitted up the portion so assigned to it,—one part as a linen room, one as a carpenter shop, one as an upholstery room, and one as a paint shop,—inclosing the same with partitions, and keeping it locked with the keys in possession of its own employes. The place so fitted up was known as the “Pullman Repair Shop.” The employes of the defendant had no right of access to it. Although the tracks of the defendant extended into this repair shop, there was folding doors across them that were closed by an iron bar on the inside. The plaintiff paid nothing for the use of this shop. The watchman over the whole premises was maintained by the defendant. With the permission and consent of the defendant, the plaintiff, on one or two occasions, repaired and varnished in that shop cars assigned by it to other railroads, and not covered by the agreement in question.

The fire in question “originated, from a cause unknown,” in the “Pullman repair shop.” It occurred about 3 o'clock on the morning of the 27th day of May, 1882, and resulted in the total destruction of both the Great Northern and the Louisiana. The Great Northern was at the time standing on the defendant's track in the paint room of that shop, behind the barred folding doors across the railroad tracks. It had been there since the previous October undergoing repairs, refitting and revarnishing, and its name changed to that of “Chatawa.” But for its destruction it would have been in condition on the day succeeding the fire to be again put into service under the contract of 1879. There was no evidence that any other car was furnished to take its place on the defendant's road while it was in the shop undergoing repairs. When the fire occurred, the Louisiana was standing on the defendant's track, in New Orleans, under a depot shed belonging to it, and used to store cars when not in actual transit,—those belonging to it as well as those belonging to the plaintiff. That shed was called by the defendant's employes the “Pullman Shed.” The Louisiana reached New Orleans about 3 o'clock in the afternoon of May 26, 1882, from a trip over defendant's road, was placed in the above depot shed, and was to have been sent out on another trip at 6 o'clock on the afternoon of May 27, 1882. The Great Northern, when burned, was under the same depot shed, but as already stated, in that part known as the Pullman repair shop. It is in evidence that, at various times during the existence of the contract sued on, the plaintiff took some of the

to cars, furnished under it, to shops in St. Louis, Missouri, and Pullman, Ill., entirely off the line of the defendant's road in order to be repaired, so as to bring them up to the designated standard.

The question of negligence was left to the jury, which was instructed that the plaintiff could not recover if the fire was caused by its negligence.

James Fentress, T. J. Semmes, and Girault Farrar, for plaintiff in error.

Thomas F. Hargis, Geo. B. Eastin, E. H. Farrar, B. F. Jones and E. B. Kruttschnitt, for defendant in error.

HARLAN, J.—1. The jury were instructed, at the request of the plaintiff, that a damage or destruction by fire is a casualty or accident, within the meaning of the contract. This the defendant contends was error. We do not think so. The fire that destroyed the Great Northern and the Louisiana originated, as we have seen, from a cause unknown. An accident or casualty, according to common understanding, proceeds from an unknown cause or is an unusual effect of a known cause. Either may be properly said to occur by chance and unexpectedly. Webst. Dict.; Imperial Dict. It was no doubt used in that sense by the parties to the contract in question. They manifestly contemplated that the railroad company should assume all responsibility for the loss of drawing room or sleeping cars, while in use, or subject to be used, by it, with the single exception, distinctly made, of loss or damage occurring "from defective heating apparatus or lights furnished" by the Pullman Company, which assumed all responsibility for loss or damage to its cars resulting from either of the latter causes. This exception in respect to defective heating apparatus and lights furnished by the plaintiff—necessarily referring to loss or damage by fire caused in either of those modes—renders it clear that the railroad company assumed responsibility for the loss of cars used or subject to be used by it under the contract, whenever such loss was by fire occurring from a cause unknown, that is, accidentally or from casualty.

Railroad Co.
liable for loss
of cars by
fire.

2. The jury were instructed that the insurance of the cars by the plaintiff was *res inter alios acta*, and had no determining effect upon the right of the plaintiff to recover in this action. The giving of this instruction has been assigned for error. We are of opinion that the obtaining of insurance by the plaintiff, the collection of \$19,000 in full settlement of its claim against the insurance companies, and the agreement between it and them for the bringing of this action for their

Collection of
insurance
does not af-
fect right of
action.

joint benefit, were matters with which the railroad company had no concern and cannot affect the determination of this case. By the provisions of the policies, the insurance companies were entitled, in case of loss, to an assignment of the plaintiff's right to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of the insurer. Upon payment of the loss, or to the extent of any payment by them on account of such loss, the insurance companies were subrogated to the rights of the insured, and could, in the name of the insured, or in their joint names, maintain an action against the railroad company for indemnity, if that company was liable to the insured for the loss of the cars. The acceptance of a given amount from the insurance companies in full discharge of their liability did not affect the right of the plaintiff to recover from the railroad company the whole amount of the loss for which the latter was responsible under its contract. The plaintiff could recover only one satisfaction for the loss; and if the amount recovered from the railroad company, increased by the sum collected from the insurance companies, was more than sufficient for its just indemnity, the excess would be held by it in trust for the insurance companies. The inquiry in this action is as to the amount for which the railroad company is bound on its contract with the plaintiff, and the recovery is not affected or limited by the amount collected from the insurance companies. As said in *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 593, 16 Am. & Eng. R. Cas. 132, which was a suit against a carrier: "Although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond for all the damages sustained by the breach of his contract. If only part of the loss has been paid by the insurer, the insured is entitled to the residue." See, also, *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 320, 321, 11 Am. & Eng. Corp. Cas. 597. This is because, as said by Chief Justice SHAW in *Hart v. Western R. Corp.*, 13 Met. (Mass.), 99, the liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. So in *Weber v. Morris & E. R. Co.*, 35 N. J. Law, 409: "Notwithstanding such payment, an action will lie by the insured against the railroad company. The insurance is to be treated as a mere indemnity, and the insured and insurer regarded as one person; therefore, payment by the insurer before suit brought cannot affect the right

of action." To the same effect are numerous other cases. *Fretz v. Bull*, 12 How. (U. S.), 466, 469; *Hall v. Nashville & C. R. Co.*, 13 Wall. (U. S.), 367, 370; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; *Clark v. Wilson*, 103 Mass. 219; *Hayward v. Cain*, 105 Mass. 213; *Gales v. Hailman*, 11 Pa. St. 515; *Perrott v. Shearer*, 17 Mich. 48; *Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333; *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265; *Swarthout v. Chicago & N. W. R. Co.*, 49 Wis. 625, 1 Am. & Eng. R. Cas. 625. The principle is thus stated by Lord BLACKBURN in *Burnand v. Rodocanachi*, L. R. 7 App. Cas. 333, 339: "The general rule of law (and it is obvious justice) is that, where there is a contract of indemnity, (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity,) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and, if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped, by having that amount back." *Castellain v. Preston*, 11 Q. B. Div. 380. It results that the court was right in holding that the insurance upon the cars and the collection by plaintiff of the insurance money were immaterial matters in this litigation. The action was well brought in the name of the plaintiff, pursuant to its agreement with the insurance companies.

3. It is assigned for error that the court refused to instruct the jury that the agreement sued on was void, as against public policy, because of the exclusive rights given to the plaintiff for the term of fifteen years in respect to drawing room and sleeping cars furnished by it to the defendant, supplemented by the stipulation that the defendant would not "contract with any other party to run the said class of cars on and over said lines of road during said period of fifteen years;" and because the law will not permit individuals to oblige themselves by a contract, when the thing to be done or omitted is injurious to the public. *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 66; *Chappel v. Brockway*, 21 Wend. (N. Y.) 157, 159. Such a contract it is argued, is in general restraint of trade. The authorities cited in support of this contention have no application to such a contract as the one before us. The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required

Agreement
not void on
grounds of
public policy.

by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing room and sleeping cars, it was a matter of indifference to the public who owned them. *Express Cases*, 117 U. S. 1, 24, 25, 23 Am. & Eng. R. Cas. 545. We cannot perceive that such a contract is at all in restraint of trade. The plaintiff was at liberty, so far as that contract was concerned, to make similar arrangements for the accommodation of passengers on all other railroads in the country, even those that are rivals or competitors in business with the defendant. It is, however, a fundamental condition in all such contracts that their provisions must not be injurious to the public. As said by this court in *Cherokee Nation v. So. Kan. R. Co.*, 135 U. S. 641, 657, 44 Am. & Eng. R. Cas. 26, a railroad is a public highway, established primarily for the convenience of the people and to subserve public ends. A railroad corporation cannot, therefore, without the sanction of the government creating it, make any agreement that militates against the public convenience, or that will defeat the public objects for which it was established. If the contract in suit was liable to objection upon these grounds, a different question would be presented for our determination. But we are of opinion that public policy did not forbid the railroad company from employing the Pullman Southern Car Company to supply drawing room and sleeping cars to be used by its passengers, and, as a means of inducing the plaintiff to perform this public service and to incur the expense and hazard incident thereto from giving it an exclusive right to furnish cars for that purpose. The defendant did not, by such an agreement, abandon the duty it owed to the public; for the cars so furnished while in its possession and use, became, as between it and its passengers, its own cars, subject to such regulations as it might properly establish for the comfort and safety of passengers on its trains. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 457, 1 Am. & Eng. R. Cas. 225. And the contract is to be interpreted in view of the condition, implied by law, that the plaintiff should furnish cars not only adequate and safe, but sufficient in number for the use of the public desiring to travel over the defendant's roads. These conditions exist

independently of the particular clause giving the railroad company the option to terminate the agreement at the end of five or eight or eleven years. Being imposed by law, as necessary to the public interests, they could not be dispensed with by agreement of the parties. The designation of particular periods of time, at the end of either of which the defendant might, of right and upon notice, terminate the agreement, did not tie its hands so that it could not continuously discharge its duty to the public in respect to the adequacy or safety of cars in which it conveyed passengers. The stipulation, therefore, that the plaintiff, not being in default, should have the exclusive right for 15 years to furnish drawing room and sleeping cars for the defendant's use, and that the defendant should not, during that period, contract for cars of that kind with any other party, rightly construed, is not unreasonable, and properly performed, will promote the convenience of the public, in that it enables the defendant to have on its lines, at all times, and as the requirements of travel demand, drawing room and sleeping cars for use by passengers. It is a stipulation that does not interfere in any degree with its right and duty to disregard the contract whenever the plaintiff fails in furnishing cars that are adequately safe and sufficient in number for the travel on defendant's lines. The suggestion that the agreement is void upon grounds of public policy or because it is in general restraint of trade, cannot, for the reasons stated, be sustained.

Besides it is not clear that the agreement is so far indivisible that the stipulation giving the plaintiff the exclusive rights in question, and binding the defendant not to make similar contracts with other parties for drawing room and sleeping cars to be used on its lines, cannot be separated from the other provisions. If that stipulation were held to be void, upon the grounds suggested, we should be inclined to hold that, as between the parties, the provision making the railroad company liable for loss or damage, arising from casualty or accident, to the plaintiff's cars, while in the possession of and subject to use by the defendant, remained in force. *Eric R. Co. v. Union Locomotive & Exp. Co.*, 35 N. J. Law, 246.

4. There can be no doubt that the railroad company was, under the evidence, liable to the plaintiff on account of the loss by fire of the Louisiana. The contract covered cars that were assigned by the plaintiff to the defendant's use, while they were in actual transit over its lines or over the lines of other companies on whose roads they were sent by the defendant. It equally covered such as were under the defendant's im-

Railroad liable for loss of cars in its possession.

mediate control while in its own yards or sheds for the purpose simply of being cleansed and resupplied for another trip when the defendant chose to put them in actual service. That was the situation at the time of the loss by fire of the Louisiana. It had a few hours before come from active service on the defendant's road, and, but for its destruction, would have been put upon the road for another trip in the afternoon of the very day of the fire. Such a case is plainly embraced by both the letter and spirit of the contract. A peremptory instruction to find for the plaintiff in respect to the Louisiana would not have been erroneous.

5. The remaining instructions involved the liability of the defendant on account of the destruction by fire of the car Great Northern. The defendant asked the court to instruct the jury as follows: "That if the jury believe from the evidence that the defendant company, by arrangement with the plaintiff company, in the year 1879, set apart at their depot in the city of New Orleans a certain portion of said depot for the exclusive use and benefit of plaintiff as a repair shop, wherein the cars of the plaintiff mentioned in the contract sued on were to be repaired by the plaintiff at its own expense, and the said space was inclosed, fastened, and locked, and the keys thereof were kept by the plaintiff or its agents so that access thereto by the defendant or its agents was only such access as was necessary to enable the defendant company to take possession of repaired cars when tendered for service by the plaintiff, and that at the time of the fire, on the 27th of May, 1882, the car Great Northern was in the said repair shop, and had been there for a period exceeding six months, for the purpose of being repaired, and that at the time of the fire said car had not been tendered for service as a car completely repaired and equipped for service to the defendant, although ready to be tendered, then the jury must find that the defendant is not liable for the loss of the said car Great Northern, or for any damage thereto by fire aforesaid." This instruction was refused, except with this modification: "Unless the jury further find that the said car had been withdrawn from the dominion of the contract, and it was held, according to the understanding of both parties, for some other purpose,—that is, for some other purpose than those of the contract." The court, in its general instructions to the jury, said: "It was undoubtedly competent for the parties to this action to have withdrawn their cars from the dominion of the contract, but to constitute such a withdrawal there must be the intent of the plaintiff to retain them for some purpose other than to continue their use under the con-

But not for
loss of car in
plaintiff's
shop.

tract; and if the jury find that there was a placing of the cars in the separate room or apartment with the intent, on the part of the plaintiff, to use them independently of the contract, and not under it, then the defendant would not be liable for their destruction. If, on the other hand, the jury find that though there was a placing of the cars in the separate room or apartment, but with the intent to continue to use them under the contract, and to hold them so placed merely for the purpose of repair under the contract, and the defendant shared this intent, then the defendant would be responsible for their destruction by fire. In determining this question the jury will consider all the facts and circumstances established, including the fact that the cars remained on the tracks of the defendant, and will further consider whether the defendant is shown to have any relations to these cars except under the contract."

The defendant also asked this instruction: "That if the jury believe that the two cars, Louisiana and Great Northern, were destroyed by fire at the depot of the defendant company, while the said cars were not in actual use and service by the defendant company, then they must find a verdict for the defendant." The court refused to give this instruction, saying: "I refuse that instruction, provided you find that they were being repaired under the contract. That's the test which the court gives you all the way through,—whether these cars, according to the meaning of the parties, were or were not under the contract, the contract providing for repairing as well as running." The court having, in this connection, instructed the jury, at plaintiff's request, that "the said contract covers the said cars while standing on the tracks of the defendant in the yards, and under the sheds used for storing cars while not in transit," said that the contract covered the cars "while standing on the tracks of the defendant in its yards and under the sheds used for storing cars while not in transit but while held for transit or repair on defendant's tracks under the contract."

It was not error to refuse that one of defendant's requests for instructions predicated upon the theory that its liability for the loss of a car from accident or casualty depended upon such car being, at the time, in its "actual use and service." Of course, the defendant meant by this instruction, and the jury would have understood, that a car was not in actual service while it was standing on the defendant's tracks, "between trips." That theory would have relieved it from responsibility for the loss of the Louisiana, although that car had come from the road only a few hours previous to the fire, and was, when destroyed, in the immediate possession and

control of the railroad company, being cleansed and prepared for the use of the passengers on another trip to be entered upon in the afternoon of the day of the fire. We have already said that this interpretation of the contract was unsound. But we are of opinion that the court below erred in not giving, without modification, the first of the above instructions asked by the defendant. By the terms of the agreement, the railroad company was bound, upon request, to make promptly such repairs of the cars furnished to it as might from time to time become necessary, and, without request, to make such as their safety demanded. The length of time the Great Northern was in the repair shops indicated either that repairs were necessary to its safety, or that "the requirements of travel" did not make it necessary to assign another sleeping car in its place. But, whatever may have been the fact in that regard, the Great Northern was not, within any fair interpretation of the contract, in the possession or under the control or supervision of the defendant, or subject to be used under and for the purposes of the contract, while it was in a repair shop of which the plaintiff had the keys, and to which the defendant's employes had no access. We do not mean to say that a car, furnished by the plaintiff, ceased to be under "the dominion of the contract" while it was being repaired as provided for in the contract. On the contrary, if the Great Northern had been destroyed by fire, the result of accident or casualty, while in the possession of the defendant, undergoing ordinary repairs, it would have been liable for the loss. No doubt the defendant's assent to liability for losses or damages resulting from accident or casualty was because the agreement contemplated that the cars furnished to and held by it under the contract would be, all the time,—whether they were on its road in actual service or in its shops undergoing repairs—in its immediate possession and control, thereby insuring the safety of the cars, so far as the vigilance of its own employes was concerned, from loss or damage from the causes named. But the Pullman Company became dissatisfied with the manner in which the repairs were made by the defendant, and undertook itself to make such repairs, in a shop set apart to it for that specific purpose, and placed under its exclusive control, and to which the defendant's agents had no access. The defendant agreed to be liable for loss or damage, from accident or casualty, if the loss occurred while the cars were in its possession, subject to be used by it or subject to its control, care, and supervision; but not otherwise. That is the meaning of the contract. Looking at the whole agreement, and giving full force to all its provisions, the defendant cannot be held to

have agreed to be liable for loss or damage accruing from accident or casualty, while the cars were in the exclusive possession and subject to the entire control of the plaintiff, and not subject to be used, controlled, or cared for by the defendant, until the plaintiff chose to surrender its exclusive possession, and return the cars to the possession and control of the railroad company. Upon the theory sanctioned by the court below, we do not perceive but that the defendant would have been liable for the loss of the Great Northern, if it had been removed to the shops of the Pullman Palace Car Company at Pullman, Ill., to be repaired, and, after being there from October, 1881, until May, 1882, had been burned up while in those shops,—a result that surely could not have been contemplated by the parties. In our opinion, the evidence did not disclose a case of liability under the contract, upon the part of the defendant, for the destruction by fire of the Great Northern, and an instruction to the jury to that effect would not have been improper.

The judgment is reversed, and the cause remanded for a new trial in conformity with this opinion.

BLATCHFORD, J., did not sit in this case or take any part in its decision.

Construction of Contract between Sleeping Car Company and Railroad Company.—See *Pullman P. Car Co. v. Missouri Pac. R. Co.* (U. S.), 22 Am. & Eng. R. Cas. 537.

OAKES

v.

NORTHERN PACIFIC R. CO.

(*Oregon Supreme Court, March 23, 1891.*)

Loss of Passenger's Baggage—Liability of Carrier.—Carriers of passengers are responsible for the carriage and safe delivery of such baggage as, by custom and usage, is ordinarily carried by travelers; and the payment of the usual fare includes, in legal contemplation, a compensation for the conveyance of such baggage.

Same—They are Insurers of Such Baggage in the same manner and to the same extent as for goods or freight.

What Constitutes Baggage.—Baggage, within the rule of such liability, is confined to such articles as are usually carried as baggage, for the personal use of the passenger, or for his convenience, instruction, or amusement on the journey, and does not include that which is carried for the purposes of business, such as merchandise or the like.

Loss of Articles not Properly Baggage—Knowledge of Carrier.—While the obligation of a carrier of passengers is limited to ordinary baggage, yet if the carrier knowingly permit a passenger, either on payment or without

payment of an extra charge, to take articles as personal baggage which are not properly such, such as stage property and theatrical paraphernalia, it will be liable for their loss or destruction, though without fault.

APPEAL from Multnomah County Circuit Court.

This is an action brought by the plaintiff to recover from the defendant the sum of \$1,401.25 on account of the alleged failure of the defendant to deliver to the plaintiff certain personal property, specifically enumerated in the complaint, and constituting the contents of seven trunks.

The complaint alleges that at the time therein mentioned the plaintiff, together with his wife and several other persons, naming them, constituted the Oakes Comedy Company, an organization giving theatrical entertainments in the villages and cities situated on the line of the company's road, and that on said day, or the night thereof, the plaintiff, as proprietor of said theatrical organization, had engaged and advertised his company to give an entertainment at Thompson's Fall, Mont., and had started with said company of people and baggage, by the defendant's line of road, to said place from Hope in Idaho; that prior to starting he applied to defendant's ticket agent at said Hope for transportation for himself and other persons aforesaid, and their trunks and contents, and other movable property necessary and proper to be used by them in the business in which they were engaged, and necessary and proper as their wearing apparel; that he informed said ticket agent that he desired transportation for said persons and property, and said agent informed him that it would be necessary for plaintiff to buy five first-class tickets for the sum therein specified to secure such transportation; and that thereupon plaintiff purchased said tickets, and secured said transportation and carriage, etc., and delivered said property to its agents and servants, which was accepted and taken in their charge and care, and for which he received checks in addition to his said tickets; that it refused and failed to deliver, etc.; and through its own negligence said train was wrecked, and a large part of the property was destroyed by fire, etc. The answer of the defendant put in issue all the allegations of the complaint, or that it had any knowledge or information as to the contents of such trunks, or the value thereof, etc. Upon the trial, the jury, at the request of the defendant, were required to find special answers to the following questions: "*First*. What do you find to be the value of the baggage belonging to the plaintiff and his company which was lost in the wreck of the defendant's cars March 25th last, aside from the stage properties, costumes, musical instruments, and theatrical property of the comedy company? Answer. \$381.25. *Second*. What do you find to

be the value of the stage properties, musical instruments, advertising matter, tickets, stage costumes, and stage paraphernalia destroyed in the wreck on the 25th of March last? Answer. \$754.75." At the same time the jury found a general verdict in favor of the plaintiff for \$1,136, being for the full value of all the property belonging to the plaintiff and his company which was lost in the wreck. The counsel for the defendant moved to set aside the general verdict because the same was inconsistent with the special findings found by the jury, and moved the court to render a judgment upon such special findings in favor of the plaintiff and against the defendant for the sum of \$381.25, which the court refused to do, and rendered judgment for the plaintiff for the sum of \$1,136.

Dolph, Bellinger, Mallory & Simon, for appellant.

Jones & Stewart, for respondent.

LORD, J.—The defendant does not deny liability for the loss or destruction of the personal baggage of the plaintiff and the members of his troupe, but he denies liability for property other than actual personal baggage. In determining the question presented by this record it is necessary to understand the nature and extent of the obligation which a carrier of passengers by rail assumes as respects the personal baggage of the passenger. That obligation requires it not only to carry the passenger, but also to carry a reasonable amount of his personal baggage. "The carriage of the baggage of the passenger," said ANDREWS, J., "under reasonable limitations as to amount, is the ordinary incident to the carriage of the passenger; and the duty arises on the part of the company to carry the baggage of the passenger as incident to the principal contract, without any specific agreement or separate compensation." *Isaacson v. New York Cent. & H. R. R. Co.*, 94 N. Y. 278, 16 Am. & Eng. R. Cas. 188. As respects such baggage, a carrier of passengers is held to the same liability as a common carrier of goods. For its loss or destruction, save by the act of God or the public enemy, it must respond, though without fault on its part. To this extent it is an insurer, and is responsible for the carriage and safe delivery of such baggage, the same as goods intrusted to it as freight. But it is only to such articles as may be legally termed "baggage" that such liability attaches, no matter what may be the contents of the bag or trunk. As to what constitutes "baggage" in the legal sense, or "ordinary baggage" or "personal baggage," as commonly used in England, it has been found by the courts

Carrier's liability for baggage.

What constitutes baggage.

difficult, if not impossible, to define with accuracy within the meaning of the rule of the carrier's liability. "It is agreed on all hands," said ERLE, C. J., "that it is impossible to draw any very well defined line as to what is and what is not necessary or ordinary baggage for a traveler. That which one traveler would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance." *Phelps v. London & N. W. R. Co.*, 19 C. B. (N. S.) 321. In a general sense it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience, and comfort, according to the habits and wants of the class to which they belong. In *Weeks v. New York, N. H. & H. R. Co.*, 9 Hun (N. Y.), 669, it is said that a passenger may carry with him "such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction, and convenience, or protection." In *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69, the rule is stated to be "that baggage includes such articles as are of necessity or convenience for personal use, and such as is usual for persons travelling to take with them." In *Johnson v. Stone*, 11 Humph. (Tenn.) 419, the court said: "It is not practical to state with precise accuracy what shall be included by the term 'baggage.' It certainly includes articles of necessity and personal convenience usually carried by passengers for their personal use; and what these may be will very much depend upon the habits, tastes, and resources of the passenger." In *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262, Mr. Justice FIELD said that the contract "to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." In *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612, COCKBURN, C. J., said: "Whatever the passenger takes with him for his personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include," he continues, "not only articles of apparel, whether for use or ornament, * * * but also the gun-case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of analogous character, the use of which is personal to the traveler,

and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise and the like, or for larger and ulterior purposes, such as articles of furniture or household goods, would not come within the description of 'ordinary luggage' unless accepted as such by the carrier." See, also, 1 Am. & Eng. Ency. Law, "Baggage," 1042; 2 Ror. R. R. 988; Hutch. Carr. §§ 677, 683, 686. So that it would seem that baggage, in the sense of the law, may consist of such articles of apparel as, through necessity, convenience, comfort, or recreation, the passenger may take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey. The question what articles of property, as to quantity and value, contained in a trunk, may be deemed baggage within the rule, is to be determined by the jury according to the circumstances of the case, subject to the power of the court to correct any abuse. *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24; *Bomar v. Maxwell*, 9 Humph. (Tenn.) 622; *Brock v. Gale*, 14 Fla. 523; *Mauritz v. New York, L. E. & W. R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286. As the contract of the carrier of passengers is to carry a reasonable amount of baggage for the accommodation of the passenger, it follows from the nature and object of the contract, as observed by APPLETON, C. J., "that the right of the passenger is limited to the baggage required for his pleasure, convenience, and necessity during the journey." *Wilson v. Grand Trunk R. Co.*, 56 Me. 62. Articles of whatever kind that do not properly come within the description of ordinary baggage are not included within the terms of such contract, nor is the carrier liable for their loss or destruction, in the absence of negligence. Stage properties, costumes, paraphernalia, advertising matter, etc., are not articles required for the pleasure or convenience, or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purposes of carrying on the theatrical business. They do not fall, therefore, under the denomination of "baggage," and in the absence of negligence, no liability can arise against the carrier for their loss or destruction, unless accepted as baggage by the carrier. And so the special jury of the verdict found. They segregated the articles which might properly be termed "baggage" from those carried for the purposes of business and

Stage properties not baggage.

found separately the value of each, but by their general verdict found the company liable for the full value of the property upon the assumption that the trunks and their contents were received by the company as baggage.

The bill of exceptions discloses that the court charged the jury, among other things, as follows: "There is another phase of this question. If you find from all the evidence in the case that these trunks were brought to the agent of the company, and their appearance indicated that they might not only contain the personal baggage in the strict sense of the word, of the party, but that other things than baggage were received without objection, and no fraud or concealment was practiced by the plaintiff, if the trunks on their face advertised fully what their contents were, and their agents received them under these circumstances, and gave checks for them, and the company, through these agents and employes, took them into its charge without making any objection, then the defendant is to be deemed to have taken these articles as baggage," etc. In substance, the complaint alleges that the defendant was fully informed of the contents of the trunks prior to their delivery, and that the defendant received and checked them as baggage, which is put in issue by the denials of the answer. Although the bill of exceptions contains no evidence, nor is any certified to us by this record, the issue permitted, and the instruction was designed to meet, the evidence upon this phase of the case. Under such circumstances, we are bound to assume that there was evidence tending to show that the defendant had notice of the nature of the property, and received it as baggage for transportation. In this view, the general verdict is not inconsistent with the special findings, for if the defendant knowingly permitted the plaintiff to take as baggage articles that would not come under that description, it is liable for their loss, though not arising from its negligence. While it is true that passenger carriers are not liable for merchandise and the like when packed up with a traveler's baggage, if the baggage be lost, yet if the merchandise be so packed as to be obviously merchandise to the eye, and the carrier takes it without objection, he is liable for the loss. Story, Bailm. § 499. Thus, in the case of *Railway Co. v. Shepard*, 8 Exch. 30, PARKE, B., said: "If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were and they had chosen to treat them as personal luggage, and carried them without demanding any extra remuneration, they would have been responsible for the loss. So, also,

Effect of
knowledge of
agent that
improper ar-
ticles were
carried.

upon any limit in point of weight, if the company chose to allow a passenger to carry more, they would be liable.' And in *Macrow v. Great Western R. Co.*, *supra*, COCKBURN, C. J., said: "If the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence." In *Sloman v. Railway Co.*, 6 Hun, 546, GILBERT, J., after stating and citing authorities to sustain the proposition that railroad companies are not liable for the loss of merchandise delivered to them under the guise of baggage for transportation along with a passenger, said: "They are liable, if they knowingly undertake to transport merchandise in trunks or boxes, which have been received by them for transportation, in passenger trains, unless the agent who receives the packages for that purpose violates a regulation of the company by so doing, and the passenger or owner of the goods has notice of such regulation;" citing *Butler v. Hudson River R. Co.*, 3 E. D. Smith, 571, and other cases. See also, 2 Wait, Act. & Def. 82. "Doubtless," said MITCHELL, J., "if the carrier had actual notice of the nature of the property, and still received it as baggage, he would be liable." *Haines v. Chicago, St. P. M. & O. R. Co.*, 29 Minn. 161. So, in *Texas & P. R. Co. v. Capps* (Tex.), 16 Am. & Eng. R. Cas. 118, it was held that where a railroad company, through its baggage or ticket agent, received articles for transportation as baggage, knowing at the time that such articles are not properly baggage, the company will be responsible therefor as a common carrier and will be estopped from denying that the same was baggage. *Chicago, R. I. & P. R. Co. v. Conklin*, 32 Kan. 55, 16 Am. & Eng. R. Cas. 116; *Minter v. Pacific R. Co.*, 41 Mo. 503. Again, in *Hoeger v. Chicago, M. & St. P. R. Co.*, 63 Wis. 100, 21 Am. & Eng. R. Cas. 308, a traveling agent applied to a railroad company to transport his sample trunks as baggage, and the company, knowing their contents, received and checked them as baggage, and carried them as such on the passenger train on which he rode; and the court held that both parties were estopped to claim that such trunks were not baggage, and to be treated as such, and not as ordinary freight. So that, while the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, it will be liable for their loss or destruction, though without fault. Now, the issue invites

and the instruction indicates that there was evidence tending to prove that the contents of the trunks were fully advertised, and that the agent of the defendant knew that they contained, besides personal apparel, stage costumes and properties, and that they were received and checked as baggage; and in such case the defendant is liable for their loss, though without fault, as the jury have found by their verdict, and the court affirmed by its judgment. In this view there is no inconsistency in the general verdict with the special findings, and the judgment must be affirmed.

What Constitutes Baggage.—See *Metz v. California Southern R. Co.* (Cal.), 44 Am. & Eng. R. Cas. 433; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (C. C.), 40 Am. & Eng. R. Cas. 636; *Staub v. Kendrick* (Ind.), 40 *Id.* 632; *Blumenthal v. Maine Central R. Co.* (Me.), 34 *Id.* 247, note 249; *Dixon v. Ritchlew Navigation Co.* (Ont.), 39 *Id.* 425, note 439.

Company Accepting Property as Baggage Becomes Liable for it as Such.—*Central Trust Co. v. Wabash, St. L. & P. R. Co.* (C. C.), 40 Am. & Eng. R. Cas. 636, note 39 *Id.* 439; *Texas, etc. R. Co. v. Capps* (Tex.), 16 *Id.* 118; *Chicago, etc., R. Co. v. Conklin* (Kan.), 16 *Id.* 116.

Valise Left in Car by Passenger—Theft of Contents—Liability of Company.—In *Bonner et al. v. DeMendose* (Texas Court of Appeals, March 21, 1891), 16 S. W. Rep. 976, it was held that, where a passenger on arrival at his destination hurriedly left the car on the suggestion of an employe in charge of it that the train would soon start, and left a valise therein, known by the employe to contain certain valuables, which remained in the custody of the defendant's employes for several hours, after which it was returned, rifled of its contents, the company is liable, although the journey had been completed. The fact that the passenger negligently left the valuables in the car does not relieve it from liability.

Ineffectual Limitation for Liability for Baggage—Presumption as to Law in Another State.—In *Davis v. Chicago, R. I. & P. R. Co.* (Iowa, June 1, 1891), 49 N. W. Rep. 77, it was held that where under Code Iowa, §§ 1308, 2184, the limitation of the liability of a railroad company for wearing apparel in a passenger's baggage to the value of \$100, by a provision printed in the ticket, is ineffectual, and where the contract for transportation is made in another state, to be executed in Iowa, it will be presumed, in absence of proof to the contrary, that the law of that state is to the same effect.

Injury to Baggage—Breaking Open Trunk—Evidence.—In an action for damages for the loss of articles of wearing apparel, from a passenger's baggage, where the object is to show that the trunk was opened by breaking the lock and fastening, it is not error to permit a witness to testify to the condition of the trunk when he saw it at plaintiff's home after her return, instead of confining the testimony to the condition of the trunk when defendant received it at defendant's depot. *Davis v. Chicago, R. I. & P. R. Co.* (Iowa, June 1, 1891), 49 N. W. Rep. 77.

Failure to Remove Baggage—Liability as Warehouseman.—On failure of the owner of baggage to remove same from a depot after a reasonable opportunity, the company acquires the capacity of a warehouseman, and is liable only for lack of ordinary care; and where a passenger, on arrival at her destination, left her trunk, for convenience and economy, at the station, though with the agent's consent, but took a small portion of the contents thereof with her, the company's liability, as carrier ceased, and that as warehouseman began. *Galveston, H. & S. A. R. Co. v. Smith* (Tex., June 23, 1891), 17 S. W. Rep. 133.

Destruction by Fire of Baggage in Warehouse—Neglect of Servants to Rescue Goods.—In *Galveston, H. & S. A. R. Co. v. Smith* (Texas, June 23, 1891), 17 S. W. Rep. 133, an action was brought against a railroad company for the value of a trunk, and contents destroyed by fire while stored in the railroad station. It was shown by the evidence that the defendant's employes while attempting to extinguish the fire, were acting in the course of their employment, and were in charge of the building. The defendant requested the court to charge that "warehousemen are not responsible for the neglect of their servants to rescue goods in the warehouse, from destruction by fire in the night, when such servants are present, but not in the course of their employment." *Held*, that the instruction was properly refused, since it was not supported by the evidence.

KALAMAZOO HACK & BUS CO. (LIMITED),

v.

SOOTSMA

(84 Michigan, 194.)

Stations—Grant of Exclusive Depot Privileges to Hack and Bus Men.—A railroad company cannot legally grant to one hack and bus company the right to use or occupy a portion of its depot grounds to the exclusion of others engaged in the like business of the carriage of passengers and freight to and from its depot; especially, since it was provided by How. St. Mich. Sec. 3355, that all railroad companies shall grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations.

ERROR to Kalamazoo Circuit Court.

Osborn & Mills, for appellant.

Hawes & Luby, for appellee.

MORSE, J.—The Kalamazoo & Hastings Construction Company, a limited copartnership, operating the Chicago, Kalamazoo & Saginaw Railroad, being in the actual occupancy of a piece of land used by it as depot Case stated. grounds in the city of Kalamazoo, leased to the plaintiff, also a limited copartnership, operating a hack and bus line in said city, a certain portion of said premises described in the lease as "that piece lying and being between the sidewalk on the east side of Walbridge street and the side track of the Chicago, Kalamazoo and Saginaw Railway, in said city, being 70 feet in length from the south end of the depot there situate, said piece or parcel of ground to be occupied by second parties for the purpose only of an omnibus, baggage, wagon, and hack stand, at and about the arrival and departure of trains upon said railway: provided, second parties shall permit the United States mail wagon and the American Express Company's wagon, doing business in the city of Kalamazoo, to

stand and occupy that portion of said piece or parcel of land which shall be assigned for that purpose by Lewis Sergeant, for the term of two years, commencing on the 21st day of July, 1890, and ending on the 21st day of July, 1892." Lewis Sergeant allotted the mail and express wagons 20 feet of ground immediately south of the depot. He also posted in two conspicuous places, upon and adjacent to the depot, the following notice: "Chicago, Kalamazoo & Saginaw Railway Co. General Office, Kalamazoo, Mich., July 21, 1890. Notice to whom it may concern: The Kalamazoo Hack & Bus Co. have leased that piece of ground which lies within a distance of (70) seventy feet immediately south of depot at Kalamazoo and between side track and sidewalk on east line of Walbridge street. Said lease contains provision that Bus Co. will assign place on this ground for American Express Co., and mail wagon. L. SERGEANT, Supt. C. K. & S. Ry." Mr. Sergeant also informed the hack and bus men generally that the ground described in said lease had been leased exclusively to the hack and bus company (the plaintiff), and that others must keep off. It also appeared that previous to the making of this lease this ground had been occupied by all the hack and bus men in the city, the defendant, among others, having been in the habit of going upon this ground and standing indiscriminately about the depot seeking passengers. On the 6th of August, 1890, the defendant, Sootsma, placed his hack upon the grounds so leased to plaintiff, and, upon being requested to move therefrom, refused to do so. He remained there until an incoming train, and obtained a passenger, and drove away with him. The plaintiff thereupon commenced suit in trespass against Sootsma in justice court, which resulted in judgment for defendant. Plaintiff appealed to the circuit court, where the circuit judge directed a verdict in favor of the defendant, on the ground that the lease was invalid, as opposed to public policy; that the lessor had no right to grant the exclusive use of the land to the plaintiff for the purposes mentioned in the lease. There was some contention in the court below, and in this court, regarding the right of plaintiff to bring an action of trespass under this alleged lease, the defendant claiming that it was a mere license conveying no property in the soil.

In the view we take of the case, this question does not become material. The plaintiff gave evidence in its behalf upon the trial in the circuit, tending to show that, in the selling by the construction company of tickets upon their road to points upon other roads, west of Kalamazoo, a coupon was attached to the ticket, entitling the passenger to transfer with baggage across the city of Kalamazoo to the railway station at which

the journey was to be resumed, and that an arrangement had been entered into with the plaintiff to perform such service, and carry such baggage and passengers; that, prior to the making of the lease, there had been trouble between the hack men and the bus men at the depot: Hack men, not connected with plaintiff's line, in some instances, solicited and secured passengers, who supposed they were to be carried on these transfer coupons, and, at the end of the trip, refused to accept such coupons, and charged them for so carrying them. This made trouble between the railroad company and passengers, and also was the cause of disorder and quarrels between the various hack and bus men about the depot, and that the lease was made to avoid such trouble and annoyance. It was not shown, however, that defendant had ever been engaged in any quarrels, or that he had refused to carry passengers upon such coupons, or had solicited passengers with the idea that he would carry them upon the coupons, and then refused to accept them, and demanded at the end of the trip other compensation for carrying them. But it is no matter for what purpose this lease was made, as long as no improper action upon the part of the defendant was shown to have induced it. The granting of this exclusive privilege to occupy this favored spot of ground, and one theretofore used customarily by all hack men and bus men, to the plaintiff, was a discrimination against the defendant, as well as all other hack men and bus men, not in the employ or service of the plaintiff, thus giving to the plaintiff a monopoly of the railroad company's grounds, for the standing of hacks and buses, and the solicitation of passengers therefor. How. St. § 3355, provides that "all railroad corporations shall grant equal facilities for the transportation of passengers and freights to all persons, companies, or corporations." A violation of this statute is punished by a penalty. This statute evidently does not relate entirely to the mere carriage in the cars of the road. To be effective, it must be construed to include also not only the receiving of such passengers and freights at its depots, but, as well, the receiving of them by other "persons, companies, or corporations," at the point upon its road where the carriage ends. The access to its depots must be free, and equal to all, whether it be to take passage or to leave the trains. No railroad company, under this statute, would be permitted to give to one hack and bus company exclusive, or even better, access to its depots than to others in the carriage of passengers or freights to its trains. Nor can it any more appropriately give such exclusive or better privilege to such company taking passengers or freights

Company cannot discriminate between hack and bus men.

from its trains, to be transported from thence elsewhere. Therefore, the circuit court was right in directing the verdict as he did. But independently of the statute, upon principle, the plaintiff could not recover in this case. A railroad company can make all needful reasonable rules and regulations concerning the use of its depots and grounds, and can exclude all persons therefrom who have no business with the railroad or passengers going to and coming from the trains or depots, and it probably can prohibit all persons from soliciting business for themselves upon its premises; but it cannot, arbitrarily, admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure. Such rules or regulations must touch and affect all alike. It may determine the distance from its depot or track at which persons soliciting passengers may stand while on its grounds, but this determination must affect and apply to all. To permit a railroad company upon any pretense, except of wrong or misconduct on the part of the person excluded, to allow one hack man or line of hacks to occupy a place upon its grounds which is denied to another, or to set apart the most favorable ground, as in this case, to one company, and to exclude the others therefrom, would be, in the language of Justice FIELD, in *Old Colony R. Co. v. Tripp*, 147 Mass. 43, 33 Am. & Eng. R. Cas. 488, to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public." The rules and regulations of a railroad company in this respect must be not only reasonable, but they must not unnecessarily infringe upon the rights of the public, and others having or carrying on business in connection with railroad traffic and travel. *Summitt v. State*, 8 Lea. 413. It has been held in Massachusetts that a railroad

**Authorities
reviewed.**

corporation may contract with one to furnish the means to carry incoming passengers, or their baggage or merchandise, from its stations, and may grant to him the exclusive right there to solicit the patronage of such passengers; but three of the seven members of the supreme court dissented therefrom, giving, it seems to me, much the better reason for such dissent. *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 33 Am. & Eng. R. Cas. 488. I can find no other case holding this doctrine. In *Cravens v. Rodgers* (Mo.), the contrary doctrine is held. The granting to the owner of one bus line the exclusive right to the best part of a railway platform at the depot, and confining a rival line to other parts of the platform, where the chance of getting pas-

sengers was not so good, was held to be a discrimination tending to destroy competition, and to encourage a monopoly, which is obnoxious to the spirit of our laws, and contrary to the constitution of Missouri, which prohibits "discrimination in charges, or in facilities, in transportation * * * between transportation companies and individuals, or in favor of either." 101 Mo. 247, 42 Am. & Eng. R. Cas. 656. And in *Montana Union R. Co. v. Langlois*, 9 Mont. 419, 42 Am. & Eng. R. Cas. 646, it is held that a railroad company cannot grant the right to receive and discharge passengers at its platform to one hack owner to the exclusion of others. In an able opinion the case of *Railroad Co. v. Tripp*, *supra*, is reviewed, and the argument of the majority opinion in that case criticised and controverted. For other cases bearing upon this question, see *Mariott v. London & S. W. R. Co.*, 1 C. B. (N. S.), 499; *In re Palmer*, L. R. 6 C. P. 194; *In re Parkinson*, *Id.* 554; *Camblos v. Railroad Co.*, 9 Phila. (Pa.), 411; *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188. While many of the cases above cited are decided in reference to statutes of the same import as our own, it is clear to me that the action of the Construction Co. Railroad Company, in this case, in leasing this ground to plaintiff, would, if sustained as valid, tend to encourage and promote a monopoly of carriage of passengers from this depot at Kalamazoo, not only to connecting routes of travel upon other railroads, out of the city, but to places within the city, contrary to the spirit of our laws, and against that public policy that refuses to encourage or foster monopolies in any kind of business.

The plea is made that the railway company, owning these grounds, or having the actual occupancy and possession thereof, have the same right of control over them that any citizen would have, under similar circumstances, provided only that it discharges its duties to the public, with reference thereto, as common carriers. This is true. But when the ground is used in its business as common carrier, and, for the purpose of standing or "setting" of hacks and buses, to solicit the patronage of incoming passengers, then it must use it for the benefit of all, and not for the privilege of one. It could probably refuse, if such refusal was reasonable, in that there was other proper ground for them to stand upon, to permit any hacks or buses to occupy the ground at all; but, if it opens the door to one, all must enter and have equal facilities and privileges one with the other. No doubt one wrongfully creating disorder or disturbance upon this ground, or defrauding or deceiving passengers, could be lawfully ejected therefrom, and, persisting in such conduct, be forever barred

Right of company to exclusive control.

therefrom by the railroad company; but that would be a matter for the railroad company, rather than the plaintiff. As the case stands, the plaintiff had no better right upon the premises than Sootsma. The judgment of the court below is affirmed, with costs.

The other justices concurred.

Right of Railroad Companies to Regulate the Use of Station Grounds by Hack and Omnibus Men.—See *Cravens v. Rodgers* (Mo.), 42 Am. & Eng. R. Cas. 656; *Montana Union R. Co. v. Langlois* (Mont.), 42 *Id.* 646; *Griswold v. Webb* (R. I.), 40 *Id.* 683; *Fluker v. Georgia R. & B. Co.* (Ga.), 38 *Id.* 379; *Old Colony R. Co. v. Tripp* (Mass.), 33 *Id.* 488. In a note to the case last cited, at page 496, the authorities upon this subject are exhaustively collated.

MELLOR

v.

MISSOURI PACIFIC R. CO.

(*Missouri Supreme Court, Division number 1, December 1, 1890.*)

Passengers—Injury to Railway Mail Clerk.—A United States railway mail clerk, engaged in distributing mail in a postal car carried by a railroad company, is a passenger upon such train, so far as the duty of the railroad company to carry him safely, is concerned and not a servant of the railroad company.

Privileged Communications—Testimony of Physician.—A party suing for injuries to his person, who calls his physician to testify, does not thereby waive his right to object to other physicians who may be treating him, testifying on the same subject.

Personal Injury—Evidence as to Lost Earnings—Pleading.—In an action for personal injuries, plaintiff gave testimony as to loss of earnings, although such loss had not been specially pleaded. The evidence was admitted without objection by the defendant. *Held*, that it was proper for the court to instruct the jury, that they might assess damages for such loss, since the defendant will be considered to have waived his right to have such loss considered in estimating the damages.

Same—Excessive Damages.—A verdict for \$6,050 for severe personal injuries received by the plaintiff, resulting in paralysis, not disturbed as excessive.

APPEAL from St. Louis Circuit Court.

Plaintiff's action is for personal injuries sustained on one of defendant's trains. He was a clerk in the employ of the United States government at the time, and as such in charge of mail matter in a postal car forming part of a passenger train on defendant's railway. The mail was carried by defendant under a contract with the federal authorities. The accident occurred near Pleasant Hill, Mo., No-

vember 27, 1886. It will not be necessary to state the pleadings in full. No point is made as to the sufficiency of the petition, except in the particular discussed in the opinion. The concluding part of it is as follows, viz.: "Plaintiff was on said train at said time as a postal clerk, in the service of the United States, and was a passenger on said train as aforesaid; that by said injuries plaintiff was made sick and sore, suffered great pain of body and mind, and was permanently crippled, disfigured, and disabled; has incurred and will incur great expenses for medicines, medical attention, and nursing; and plaintiff is thereby damaged in the sum of twenty-five thousand dollars, for which he prays judgment." The answer was a general denial, and a plea of contributory negligence. The latter was put in issue by a general reply. Plaintiff's evidence tended to show (in addition to the facts above stated) that he was attending to his routine duties in the mail car when the train of which it formed a part, moving westward at the rate of some 30 miles an hour, collided with a freight train going eastward. Plaintiff was struck by heavy timbers, and pinioned fast amid the wreck. He was afterwards extricated, and found to be seriously hurt. The evidence regarding the extent of his injuries appears more fully in the opinion. It seems that plaintiff after the accident was first attended professionally by Dr. Scott, for several months. Then he made a change of physicians, Dr. Glancie taking charge of his case. Plaintiff introduced the latter as a witness to prove the nature and extent of his injuries. When the defense was reached, Dr. Scott was offered as a witness, but, after a brief examination, from which it appeared that his knowledge of plaintiff's condition was derived while attending him in a professional character as physician, the court (on plaintiff's objection) excluded any disclosures by him of the information so obtained, to which ruling defendant duly excepted. The testimony of defendant was wholly directed at the issue of plaintiff's damages, and tended to contradict that offered on his behalf regarding the extent and permanency of his injuries. At the close of the case the court gave the instructions following: For plaintiff: "If the jury believe from the evidence that the defendant, on the 27th day of November, 1886, had received and was carrying the plaintiff upon its car as a postal clerk in charge of the United States mail, an employe of the United States government, and if the jury believe from the evidence that while the plaintiff was being so carried he was injured by reason of a collision between the train on which the plaintiff was being so carried, and another of defendant's trains, then the plaintiff is entitled to recover, unless the defendant

shall establish to the satisfaction of the jury by evidence that said collision could not have been avoided by the agents and servants of defendants having control of the movements of said trains, or either of them, by the exercise of the utmost care and foresight of very prudent persons. If the jury believe from the evidence that the plaintiff was, on the 27th day of November, 1886, a postal clerk in the employment of the United States government; and if the jury believe from the evidence that upon said day the defendant was carrying the plaintiff upon one of its cars as such postal clerk in charge of the United States mail; and if the jury believe from the evidence that while the defendant was so carrying the plaintiff upon its car as such postal clerk, the plaintiff was injured by reason of a collision between defendant's said train and another of defendant's trains; and if the jury further believe that said collision was caused by the failure of the defendant or any of its agents or servants having control of said trains, or either of them, to exercise the utmost care and foresight of very prudent persons to avoid said collision; and if the plaintiff was at the time of his injury exercising ordinary care,—then plaintiff is entitled to recover. If the jury believe from the evidence that prior to and on the 27th day of November, 1886, the defendant was operating the cars and railway hereafter mentioned in the business of carrying passengers and freight for hire, as a common carrier; and if the jury believe from the evidence that at said time the defendant was engaged in carrying the mail of the government of the United States, upon its car, by virtue of a contract with said government; and if the jury believe from the evidence that on said day the plaintiff was on one of defendant's cars as a postal clerk in the employment of said government, and that plaintiff was received by the defendant and its agents and servants in charge of its train upon said car, to be carried as such postal clerk; and if the jury believe from the evidence that while the plaintiff was being so carried upon said car he was injured by reason of the train upon which he was so being carried colliding with another of defendant's trains; and if the jury believe from the evidence that said collision was caused by reason of the failure of defendant's servants upon either of said trains, or controlling the movements thereof, to exercise the utmost care of a very prudent person to avoid said collision; and if the jury believe from the evidence that the plaintiff at the time of his injury was exercising ordinary care,—then the plaintiff is entitled to recover." For defendant: "The court instructs the jury that unless they find from the evidence, and by a preponderance thereof, that the falling of plaintiff in the car at the Union depot, in

this city, after he had resumed his occupation as postal clerk for a period of about six weeks, was the direct and natural result of the injury received in the collision of November, 1886, testified to, then, for any disability that has ensued from such falling and sickness, defendant is not liable." Of its own motion: "If you find for the plaintiff, you should assess his damages at such a sum as you may believe from all the evidence will be a fair compensation to him for any pain of body or mind, for any loss of earnings, for any expenses necessarily incurred for medical attention, and for any permanent physical disability (if any or either or all such) which you may believe from the evidence the plaintiff has sustained or will hereafter sustain, by reason of his said injuries, and which you may find from the evidence to have been directly caused by the collision mentioned in the evidence. If you have a sympathy or prejudice in favor of or against either party you should not allow it to influence you at all in your verdict, but in your verdict you should be guided alone by the evidence and the instructions given you by the court." The following requests by defendant for instructions were refused, viz.: "(1) The court instructs the jury that, under the pleadings and evidence in this cause, the plaintiff is not entitled to recover. (2) In the event that the jury find for plaintiff, they will only assess such damages as will reasonably compensate him for the injury received by him in the collision testified to, that grows directly and naturally therefrom, and will allow nothing out of sympathy or feeling for him, or out of prejudice or feeling against the defendant railway company." The jury returned a verdict for plaintiff for \$6,050 damages, on which judgment was entered. After the proper motions and exceptions, defendant appealed.

Bennett Pike and *H. J. Herbel*, for appellant.

A. R. Taylor, for respondent.

BARCLAY, J.—1. That plaintiff was riding upon defendant's train, by virtue of some contract or arrangement between defendant and the federal government touching the carriage and care of the United States mail, Postal clerk is a passenger. was clearly established by the testimony. Defendant's contention that in such a situation he should be regarded as its servant we consider too untenable for serious discussion. There was neither allegation nor proof on defendant's part that plaintiff was in its employ in any capacity and certainly no such inference fairly arises from any of the facts in evidence. This being so there is no foundation on which to predicate a defense that plaintiff's injury arose from any negligence of fellow-servants. The train operatives

were clearly not such as to him. Defendant's duty to him, so far as concerned safe transportation, was as a passenger. *Seybolt v. New York, L. E. & W. R. Co.*, (1884,) 95 N. Y. 562, 18 Am. & Eng. R. Cas. 162; *Blair v. Erie R. Co.*, (1876,) 66 N. Y. 313; *Yeomans v. Contra Costa Steam Navigation Co.*, (1872,) 44 Cal. 71; *Collett v. London & N. W. R. Co.*, (1851,) 16 Adol. & E. (N. S.) 984; *Hammond v. North Eastern R. Co.*, (1874,) 6 S. Car. 130. This point being settled, there remains no basis for defendant's contention that the court erred in refusing an instruction in the nature of a demurrer to the evidence.

2. Defendant urges its exception to the ruling excluding the testimony of Dr. Scott. It is not denied that the questions called for a disclosure of information concerning plaintiff's injuries which Dr. Scott acquired while attending plaintiff as a physician; but the contention is that the evidence was admissible because plaintiff had waived the protection of the statute by offering Dr. Glancie as a witness regarding the same injuries. The language of the statute on the subject is that a physician or surgeon "shall be incompetent to testify concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." Rev. St. 1889, § 8925; Rev. St. 1879, § 4017. It is conceded that a physician may be permitted to testify at the instance of his patient concerning facts acquired by him in his professional relation; but it does not necessarily follow that, by introducing such a witness, the patient impliedly waives his right to object to every witness that may be called by his adversary in relation to the same subject. The ban of incompetency is placed by the statute on certain witnesses. It does not exclude the evidence by reason of its inherent character, but only when given by the persons within its purview. *Hoy v. Morris*, (1859,) 13 Gray, 519. A party to litigation may be willing to waive the objection of incompetency as to a witness in whom he reposes special confidence, yet insists on it as to another. It has been held in New York, under statutory language somewhat resembling ours, that where a physician, thus declared incompetent, testified at the instance of his patient upon one trial, the party so calling him could not insist on his exclusion as a witness to the same facts at a subsequent trial of that cause. *Edington v. Ætna L. Ins. Co.*, (1879,) 77 N. Y. 564. But that decision furnishes no authority, or even an analogy, to support the position taken by defendant here.

Privileged
communication—Testimony of
physician.

Westover v. Aetna L. Ins. Co., (1885,) 99 N. Y. 56. In a still later case, the court of appeals of that state has announced the same conclusion on the subject of waiver which we have now reached. *Hope v. Troy & L. R. Co.*, (1886,) 40 Hun (N. Y.), 438; affirmed, (1888,) 110 N. Y. 643. We incline to the opinion that plaintiff, by calling Dr. Glancie to testify in his behalf, merely waived his incompetency for the purposes of the case, but cannot thereby be justly deemed to have assented to the examination of every other witness pronounced incompetent by the statute, who might possess confidential knowledge on the same general subject.

3. Some objections are made to the rulings on the instructions which will be noted briefly. As we have already ruled, the facts in evidence, unexplained, gave plaintiff the *status* of a passenger, so far as concerned his right to safe transit. Starting from this postulate, it follows that there was no error in the instructions given regarding the degree of care towards him devolving on defendant, for they embody the rules of law on that subject recently approved in *Furnish v. Missouri Pac. R. Co.*, (Mo.) 13 S. W. Rep. 1044, and therefore need not be reviewed in detail. No evidence was offered by the defendant tending to explain or excuse the collision between its trains, or tending to show any contributory negligence on plaintiff's part. In this state of the case, the instructions regarding defendant's duty to safely carry plaintiff, however viewed, cannot be said to contain any error to the prejudice of defendant's substantial rights upon the merits. Rev. St. (1879,) §§ 3569, 3775; Rev. St. (1889,) §§ 2100, 2303.

Degree of care
required of
defendant.

Next the instruction on the measure of recovery is challenged as erroneous because it mentions "loss of earnings" as an element of damage, whereas the petition makes no claim or compensation on account thereof. Loss of earnings is a kind of injury which is not regarded as a necessary consequence of such acts as are complained of here, and therefore is not embraced within the plaintiff's general allegations of damage. It is one sort of special damages, and consequently must, in some wise, be counted upon to constitute a basis for evidence on the subject. The purpose of this rule is to prevent surprise, and to inform defendant of the exact scope of plaintiff's demand. But defendant may waive its benefits, and where, as here, evidence of the earnings of plaintiff at the time of the accident has been admitted to furnish a basis for such a recovery, without objection, it will be regarded as such a waiver.

Damages for
loss of earn-
ings—Plead-
ing.

4. It is insisted that the damages as assessed (\$6,050)

are excessive. Plaintiff's evidence tended to show that he was rendered unconscious by the shock of the collision, and suffered severe pains constantly where he was struck by the beam that held him fast in the wreck; that there remained two black and blue patches on his back for three or four months; that his left leg was cold, as if dead, for about five months; that some ten weeks after the accident, he returned to his post, and for six weeks discharged his duties; but suddenly, while at work, became unconscious, as though "somebody had thrown a mail sack and hit" him, and after that had not been able to resume his labors up to the time of trial; that he cannot grasp anything tightly in his left hand, and cannot do any work at all; and that every change of weather gives him pain through the left leg up to the hip joint; that his medical expenses were about \$400 prior to the trial, and his earnings \$1,150 a year before the accident. His physician testified that plaintiff was suffering from paralysis, which, in his opinion, based on the symptoms exhibited, was ascribable to an injury to the spinal cord, and that he did not think plaintiff would ever entirely recover from the effects of the injury. This verdict comes to us with the approval of the trial judge, who has seen the plaintiff, and heard his statements and those of the other witnesses, face to face. The medical evidence, touching the permanency and extent of plaintiff's injuries is conflicting, and, after a careful consideration of it, we are not prepared to say that the damages awarded are sufficiently large to justify the intervention of this court. The judgment is affirmed.

RAY, C. J., concurring on all points.

BLACK, J., concurs in affirming, and in the reasons given except as to the ruling upon "loss of earnings" as an element of damage, (in the third paragraph,) regarding which he is of opinion that the allegations of the petition are sufficient to support the instruction, the evidence on that point having been admitted without objection. SHERWOOD and BRACE, J. J., dissent from that part of the opinion, and from the result announced.

This opinion by the supreme court in department was affirmed by the court in *banc*, June 15, 1891.

Excessive Damages for Personal Injuries.—See note, 46 Am. & Eng. R. Cas. 667.

Liability of Railroad Company for Injury to Postal Clerks.—See note, 41 Am. & Eng. R. Cas. 70.

When Relation of Passenger and Carrier Exists—Employes Borrowing Car and Engine.—Deceased and other employes of defendant railroad com-

pany had borrowed a car and engine for their own purposes, by permission of defendant's yardmaster, and in the negligent management thereof plaintiff's intestate was killed. *Held*, that the relation of carrier and passenger did not exist, and plaintiff cannot recover. *Davis v. Chicago, St. P. M. & O. R. Co.*, 45 Fed. Rep. 543.

Same—Traveller Taking Seat in Freight Caboose Without Buying Ticket.—In *Powell v. East Tennessee, V. & G. R. Co.*, (Miss. Feb. 2, 1891,) 8 So. Rep. 738, which was an action against a railroad company for personal injuries, plaintiff alleged that, being desirous to return home at once, and the first train thither being a freight train, he approached the conductor thereof, and inquired whether freight trains were prohibited from carrying passengers; that the conductor replied that he knew of no such prohibition, and told him to take a seat in the caboose, which he did, and remained there quietly until a following freight train struck him. There was no allegation that he paid or tendered any fare. *Held*, that the declaration was demurrable, as not showing the relation of carrier and passenger between the parties.

PURCELL

v.

RICHMOND & DANVILLE R. CO.

(*North Carolina Supreme Court, March 17, 1891.*)

Passengers—Failure to stop at Station for—Punitive Damages.—Where passengers at a regular station, waiting to take a train advertised to stop at such station, are left, owing to the failure of such train to stop, the railroad company is guilty of a tort, and is liable to such passengers for punitive damages. The fact there was no room on such train for more passengers will not excuse the company, if it appears that by the exercise of reasonable diligence it might have provided more accommodations.

APPEAL from Alamance Superior Court.

The plaintiff asked the court to charge the jury that, if they believed that the defendant stopped its train at Mebane, and received and discharged passengers, and also at Graham, and there received 12 or 15 passengers, and discharged 2 or 3, and that there was then room, standing or sitting, for 50 or 60 persons at the time the train passed Haw River, and that a part of the tickets were sold to persons at Haw River the evening before, and in due time to communicate with the officers of the company, then to run by, as shown in this action, is such willful disregard of the rights of the plaintiff as would entitle him to recover punitive damages. This prayer was refused, and plaintiff excepts. The court instructs the jury that, upon the testimony, they would not be warranted in finding the defendant guilty of such a degree of negligence as indicated,—a reckless indifference to consequences, oppression, needless caprice, willfulness, or other cause of

aggravation, as would entitle plaintiff to punitive damages. The measure of damages upon the admitted facts, or those proven, if the jury believe the testimony, would be the price paid for the ticket, 15 cents, and the amount paid for another conveyance to Burlington, 25 cents. Appeal by plaintiff.

J. A. Long, for appellant.

D. Schenck and *F. H. Busbee*, for appellee.

CLARK, J.—Code, § 1963 provides: “Every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads, and at usual stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport, and discharge such passengers and property at, from, and to such places on due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises.” For a violation of such statutory duty the plaintiff might have sued in contract. (*Hodges v. Wilmington*

Statutory provisions.
Defendant liable for punitive damages.

& W. R. Co., 105 N. C. 170;) but he could elect to sue in tort for the injury, and the breach of public duty, (existing independent of the statute,) by the willfulness or negligence of defendant, (*Bish. Non-Cont. Law*, §§ 73, 74.) If the tort was committed by mere negligence of the defendant, as simple carelessness or inadvertence, the plaintiff would be restricted to compensatory damages, and, as no special damages were alleged and shown, other than obtaining another conveyance, the measure of damages, as laid down by the court, to-wit, the price of the ticket and of procuring such other conveyance, 40 cents in all, would have been correct. But if the conduct of the defendant was willful, or showed such gross negligence as to indicate a wanton disregard of the rights of the plaintiff, he was entitled to recover punitive damages in addition. Railroads are granted valuable franchises and privileges by virtue of the state's right of eminent domain. On their part they assume correlative obligations and duties to the public, and become *quasi* public servants. They are not granted such great and unusual privileges to the sole end that they may be operated for the mere pecuniary benefit of the corporation, and at the arbitrary pleasure and will of their managers and employes. It is well recognized that they are subject to proper regulation, supervision, and control by public author-

ity, and that they owe duties to the individuals who may wish to ship goods or to travel over their lines. When the defendant advertised its schedule, and the plaintiff bought a ticket and presented himself at the advertised time at a regular passenger station of the road, he had the right to be taken aboard the cars on their arrival at that point. In running its cars by the station without stopping, the defendant committed a breach of public duty,—a tort. If such breach was mere inadvertence or negligence, or was caused by an unforeseen number of passengers presenting themselves, which rendered it unsafe to take a greater number aboard, and the company could not by reasonable diligence have increased the number of cars, then the plaintiff would be held to recover only the bare compensatory damages laid down. If, however, the defendant, having advertised for passengers for that train, by reasonable diligence could have ascertained that the number of cars was insufficient, and made no effort to supply the deficiency, but regardless of its duties, and of the rights of those whom it had invited to leave their ordinary avocations, and present themselves at its regular station for passage, ran its train by the station without stopping, or if there was room in the cars for 50 or 60 persons additional, and the train passed by the station without taking on at least as many as it had accommodations for, then the defendant did display a gross and willful disregard of the rights of the plaintiff which entitled him to recover punitive damages. There was evidence to justify, if believed, the state of facts recited in plaintiff's prayer for instruction, and it was error to refuse to grant it. Should an excessive verdict have been found by the jury, the discretion rested with the trial judge to correct it; but it would be a denial of justice to permit a common carrier to exhibit such arbitrary and willful neglect of the duties it has assumed, and such disregard of the rights of others. Yet such is the effect if, without adequate excuse, it should be allowed so to act, with no other penalty than refunding the price of the ticket and the price paid for another conveyance, since the latter would be demanded in very few cases, and only when the destination is at a short distance. The effect of such ruling would be to license the common carrier to furnish cars or not, and to stop at its regular stations or not, at its arbitrary pleasure, and not as a duty required by law. The refunding the price of the ticket would amount, in most cases, to nothing, as the passenger would usually buy a ticket by the next train. Yet the inconvenience, annoyance, and injustice to the travelling public by such detentions would be great and difficult to estimate. A case exactly in point is *Heirn v. McCaughan*, 32 Miss. 17, where it is held that ex-

emplary damages were recoverable against a common carrier (there a steamboat company) in an action of tort for violation of duty in willfully refusing to land its vessel, and receive the plaintiff as a passenger, according to its advertisement. In *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660, which was a case somewhat similar, where the train ran by the regular station without stopping to put off (instead of to receive) a passenger, the court affirm the case last cited, and say it is "the right of the jury in such cases to protect the public, by punitive damages, against the negligence, folly, or wickedness which might otherwise convert these great public blessings into the most dangerous nuisances." It is the duty of a common carrier, especially where it has a monopoly, to provide sufficient cars for the transportation of all passengers, as well as for the carriage of all freight which its invitation naturally brings to it, as was held in *Branch v. Wilmington, etc., R. Co.*, 77 N. C. 347. Indeed, the identical facts of the present case are cited by Judge RODMAN as an hypothetical illustration in that opinion. Page 351. No regard for their own profits or convenience will justify the corporation in having only sufficient cars for the ordinary amount of freight and travel, leaving the public to bear the inconvenience and loss, when, on unusual occasions, the volume of business may swell beyond the average. Common carriers could not be held liable for an unforeseen and extraordinary rush of business not within reasonable calculation, but when the additional volume of travel or freight is such as, with reasonable foresight, could be expected, it is the duty of the company to have the extra cars furnished. With the modern facilities of telegraph and telephone, the occasion of an unusual number of passengers or quantity of freight can be promptly notified and provided for. If this is not done, it is gross and willful negligence, and the company should not be allowed to find its profit in a willful and reckless disregard of the rights of the public, and of its own duties. It may be that on the whole testimony the defendant could show sufficient matter of excuse, but the plaintiff was entitled to have the phase of the evidence set out in his prayer for instruction presented to the jury. Taking that evidence to be true, and nothing else appearing, he was entitled to recover punitive damages.

Error.

Failure to Stop Train at Station and Take on Passengers—Action for Tort—Sufficiency of Complaint.—In the case of *Purcell v. Richmond & D. R. Co.* (North Carolina, March 17, 1891,) 12 S. Rep. 956, the plaintiff sued to recover damages for the failure of the defendant company to stop its train at a regular station and allow him to take passage thereon. The complaint alleged that the plaintiff went to the station to take passage on an advertised train of the defendant company, but that such train passed

without stopping and allowed no passengers to get on, to plaintiff's great disappointment, annoyance and damage in the sum of \$500. Held, that such complaint stated an action for a tort and not for a breach of a contract, and that it was necessary that it should state the price paid by the plaintiff for his ticket. CLARK, J. said: "A case exactly in point, however, is *Heirn v. McCaughan*, 32 Miss. 17, in which it is held, 'an action against a common carrier for a failure to stop at a regular station, and take on board a passenger, according to advertised schedule, is founded in tort, and not on a special contract; it being for a violation of a general duty to the public.' Even had the plaintiff alleged the price paid for the ticket, (which was not necessary in the action for tort,) it would not have been conclusive that the action was in contract; for the facts alleged in the complaint, taken as a whole, show that the plaintiff was not seeking to recover in contract for the pittance paid for his ticket, but for the wrong done him by the breach of public duty, and the wilful disregard of his rights by the defendant in not allowing him to get on the train at its regular depot, but running its train by without stopping, and 'leaving him standing and remaining at said depot, to his great disappointment, annoyance, and damage in the sum of five hundred dollars.' It is clear that whatever merits the evidence might indicate, as a matter of pleading the plaintiff's action was in tort, that the superior court had jurisdiction, and that the complaint did not fail to state a cause of action, in that (as defendant demurred) the price of the ticket, special damages, and other matter which would have been proper in an action *ex contractu* were not alleged. Indeed, the whole subject has been so recently considered in *Bowers v. Richmond & D. R. Co.*, 107 N. Car. 721, that we might have contented ourselves with a bare reference to that case, in which MERRIMON, C. J., says: 'Obviously these words were intended to allege more than a simple breach of the contract; a tort,—a tortious injury. Granting that more appropriate terms for such purpose might have been employed, still the court can see the purpose informally expressed, and, as it can, the pleading should be upheld, and the jurisdiction sustained.' Under the former system of practice, the pleadings were construed most strongly against the pleader, but now the statute (Code, § 260) requires them to be 'liberally construed, with a view to substantial justice between the parties.' The case of *Hannah v. Richmond & D. R. Co.*, 87 N. Car. 351, 10 Am. & Eng. R. Cas. 737, relied on by the defendant's counsel, is really, it seems to us, an authority against him. There the plaintiff alleged that he had been wrongfully put off the cars after having bought and paid for his ticket. The court held that it was an action for tort, but that, the plaintiff having died before judgment, the action abated as to the punitive damages for the technical assault, (Code, § 1491, subd. 2;) and that, treating it as an action *ex contractu* to recover the price of the ticket, the amount stated was within the jurisdiction of a magistrate. The demurrer to the jurisdiction and for failure to state a cause of action in the present case is based entirely upon the alleged insufficiency of the complaint, treating this as an action on contract. The measure of damages, treating it as an action in tort, is considered in the plaintiff's appeal."

Passengers Left Owing to Failure of Train to Start From Platform of Station—Special Regulations.—In *Connell v. Mobile & O. R. Co.* (Mississippi, February 17, 1890,) 7 S. Rep. 344, the plaintiff brought suit to recover damages for the failure of defendant's train to stop at station platform for her when she had her regular tickets. The following facts appeared: Plaintiff's husband bought for her a regular ticket, to be used on a freight train with passenger coach attached, which was run by defendant under special regulations posted at the stations along the road, to the effect that the train could not be required to stop at the platforms of stations to take on

or put off passengers. Special tickets, in accordance with such regulations, were sold for this train, but the agent at the time had none on hand and the husband was acquainted with the regulations. Plaintiff and her husband waited on the platform for the train to be pulled up, not because they expected it to do so as a custom, but because they had been informed by a bystander that he had requested the conductor to do so, and the train pulled out and left them. Plaintiff then bought another regular ticket for the passenger train, which did not pass till night, and brought an action against the company for damages. *Held*, that, as the regulation prescribed by the company was a reasonable one, plaintiff was not entitled to recover.

ST. LOUIS & SAN FRANCISCO R. CO.

v.

GILL.

(*Arkansas Supreme Court, January 3, 1891.*)

Passenger—Overcharge—Voluntary Payment. A voluntary payment by a passenger of an illegal overcharge, does not preclude a recovery by him for the statutory penalty.

Same—Speculation in Penalties—Public Policy.—The fact that a person takes passage upon a railroad train, not for ordinary purposes, but for the sole purpose of accumulating penalties against it on the ground of overcharges, does not preclude him from maintaining an action to recover the statutory penalties therefor.

Immunity from Regulation of Charges—United States Military Post Route.—The fact that the United States government has granted a railroad company a right of way, and has declared it to be a post and military route and a national highway for governmental service, does not give such railroad company immunity from state regulation in respect to rates.

Foreign Railroad Company Subject to Legislation Regulating Passenger Rates.—Under Const. Ark., Art. 12, § 6, a foreign railroad company which has entered the state to operate a road after this provision was in force, is subject to legislation, reducing passenger rates, provided such regulation does no injustice to the corporators.

Justice of Regulation of Rates—How Determined—Railroad as Entirety.—Under a constitutional provision that the regulation of railroad rates must do no injustice to the corporators of the railroad company, the question of the justice of the regulation of passenger rates must be determined by its effect upon the net earnings of the entire line operated by the railroad company, and not by its effect on the net earnings of any given subdivision; even though such subdivision was formerly owned and afterwards consolidated with the company in question.

APPEAL from Washington Circuit Court.

B. R. Davidson, John O'Day, and E. D. Kenna, for appellants.
Dan. W. Jones, for appellee.

HEMINGWAY, J.—The questions presented by this appeal depend upon the sufficiency of ten several paragraphs of the answer of the defendant below, appellant here, to each of which a demurrer was sustained. There was a trial upon one paragraph, and verdict and judgment for the plaintiff.

Joint rules of
assembly.

In the second paragraph it was alleged that the act of April 4, 1887, entitled "An act to regulate the rates to be charged by railroads for the carriage of passengers," was not passed by the several houses of the general assembly in accordance with their joint rules, and that the bill as passed did not contain any provision limiting the rates that could be charged for the transportation of passengers. The joint rules of the general assembly were creatures of its own, to be maintained and enforced, rescinded, suspended, or amended, as it might deem proper. Their observance was a matter entirely subject to legislative control and discretion, not subject to be reviewed by the courts. That the act as passed contained a clause limiting passenger rates, was settled by this court in *Dow v. Beidelman*, 49 Ark. 325.

The substance of the ninth paragraph is that the appellee voluntarily paid the alleged overcharge, and that he therefore could not recover. Whether the conclusion would follow, if he sought to recover the amount of the overcharge, we need not decide. A voluntary payment of the overcharge does not preclude a recovery for the statutory penalty.

Overcharge —
Voluntary
payment.

The eighth paragraph sets up that the plaintiff went upon the defendant's train, not for the purpose of ordinary business or pleasure, but for the sole purpose of accumulating penalties against it, and that it would be against public policy to allow him to maintain this action and thereby speculate in penalties. The act was not intended to provide a compensation for the injured passenger, but to deter railroad companies from taking excessive fares by punishing every such act. Each overcharge is in violation of law, and every payment of it is a legal wrong to the party making it who is thereby aggrieved within the meaning of the act, and by its express terms entitled to sue. *Fisher v. New York Cent. & H. R. R. Co.*, 46 N. Y. 644; *Raht v. Union Consolidated Min. Co.*, 5 Lea (Tenn.), 1.

Plaintiff's
purpose in go-
ing on train.

In the sixth paragraph it is alleged that by virtue of various acts of congress the line of defendant's road is declared a post and military route and national highway for postal, military, and all other governmental services, and is subject to be regulated only by act of congress; that it became such by grants of land and right of way from the government, and is thereby, exempt from state regulation. We do not appreciate the force of this defense. We do not understand that a grant of lands or a right of way over lands by the government confers immunity from state regulation upon its grantee.

Regulation of
charges—Na-
tional post
and military
route.

The remaining paragraphs of the answer contain objections

by which, as it is claimed, the act in question was shown to be in conflict with the provisions of the state and federal constitutions. As they contain many repetitions of the same allegations, varying only in the different paragraphs in respect of form, we will state and consider them together. They are substantially as follows: That the alleged overcharges were made for passages on that part of the defendant's road formerly owned by the St. Louis, Arkansas & Texas Railway Company in Arkansas. That said company was duly organized under the general laws of the state of Arkansas in 1880. That by the laws then in force, and which were a part of its contract with the state, it was provided that said corporation, its successors or assigns, might fix such rates of fare as to it should seem proper, but that the legislature might alter or reduce its rates: provided, that no such reduction should be made until the net proceeds of its road for one year had exceeded 15 per cent. of its capital actually paid in: and provided, further, that such rates should not be so changed as to produce a profit below 15 per cent. as aforesaid. That, in accordance with the general laws of the states of Arkansas and Missouri, said St. Louis, Arkansas & Texas Railway Company, on the 10th day of February, 1881, was consolidated with two other corporations, in the name of the St. Louis, Arkansas & Texas Railway Company, Consolidated, which latter company succeeded to all the property, power, privileges, rights, and immunities which belonged to either of the consolidating companies. That at the time of the consolidation the road of the original Arkansas corporation had not been completed, and that it and the consolidated corporation were without means to complete the road. That on the 2d day of February, 1882, the consolidated company, by the authority and in pursuance of the general laws of the states of Arkansas and Missouri, sold and conveyed to the appellant all its railroad in said state, together with all its rights, privileges, franchises, and immunities thereunto belonging or appertaining; the appellant assuming, in consideration thereof, all the debts and obligations of the consolidated company. That the appellant thereby succeeded to the rights of the consolidated company, under its contract with the state, to fix such reasonable rates of fares for the transportation of passengers as would enable it to realize a profit of not less than 15 per cent. per annum of its capital actually paid in. That the road of said consolidated company has been completed for five years, and has never earned during any year profits to exceed 3 per cent. on the capital actually paid in, and that neither of the consolidating roads had earned profits during any year in excess of

such rate. That the net earnings of said consolidated road for the next two years would not exceed 3 per cent. on the capital actually paid in, or on the amount actually expended on the consolidating lines; and that, if appellant is required to charge no more than 3 cents per mile for the carriage of passengers on said line of railway, its earnings will be so reduced that no profit whatever will inure to its owners, and such earnings will not pay reasonable interest on the fixed indebtedness actually incurred in constructing the road. That the formation of the original company, its consolidation with others, and the sale by the consolidated company, each and all constitute contracts between the state and said several companies, entered into upon the faith that each of said several companies should have the right to fix its rates for the carriage of passengers at any sum it might deem proper which would not produce an annual net profit on the capital actually paid in to exceed 15 per cent. That the act in question alters the said several contract, and is in violation of § 10, art. 1, of the federal constitution. That by § 6, art. 12, of the constitution of Arkansas, in force at the several dates aforesaid, it is provided that no charter of any corporation shall be altered, revoked, annulled, or repealed in such a manner as to do injustice to the corporations, and that the act is in violation of said provision. That the line on which the stations named are located contains heavy grades, many cuts and fills, bridges, trestles, embankments, and tunnels, the construction of which cost, and the maintenance of which does and will continue to cost, extraordinarily and unusually large sums of money; and that it is reasonable and just to charge five cents per mile for carrying passengers over said line. That to limit its passenger rate to three cents per mile takes its property without compensation, in violation of the fifth and fourteenth amendments to the federal constitution. That it is special legislation, and discriminates against the defendant, in this: that it permits a company operating 75 miles of road, or less, to charge five cents per mile passenger fare, but prohibits a company operating more than that length of road from charging that amount for a passage not exceeding that distance, in violation of article 11 of the state constitution, and of section 1 of the fourteenth amendment to the federal constitution. That the defendant's road is made up of roads that formerly belonged to different companies, and the stations named are situate on a line which, as formerly owned, was less than 75 miles in length. That therefore the former owner might have charged five cents per mile fare; and the appellant, as its successor, acquired the right to make the same charge. That, before the consolidation of the companies before named, the

St. Louis, Arkansas & Texas Railway Company in Arkansas, for the purpose of constructing its road, mortgaged its property to secure bonds which were placed on the market, and sold to purchasers who in good faith relied upon the observance on part of the state of its contract with the company relative to fixing its passenger rates. That said bonds are unpaid, and, if the appellant is permitted to charge no more than three cents per mile for carrying passengers, the earnings of the road of the original company will be insufficient to pay the interest on said bonds, and default will be made therein. That the act is therefore unconstitutional.

In the view that we have taken of the law, it will be unnecessary to go into the discussion of the act as affected by the provisions of the federal constitution relied upon by the appellant. When the St. Louis, Arkansas & Texas Railway Company in Arkansas was organized, the constitution of the state contained the following provisions: "Sec. 6, art. 12. Corporations may be formed under general laws; which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporators." "Sec. 11, art. 12. Foreign corporations may be authorized to do business in this state, under such limitations and restrictions as may be prescribed by law: provided, that no such corporation shall do any business in this state, except while it maintains therein one or more known places of business, and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this state, they shall be subject to the same regulations, limitations, and liabilities as like corporations of this state, and shall exercise no other or greater powers, privileges, or franchises than may be exercised by like corporations of this state; nor shall they have power to condemn or appropriate private property."

Those provisions have ever since been, and now are a part of the fundamental law of the state. They entered into and became a part of the contract between the state and the corporations concerned in this cause. By their terms the state was authorized to alter, revoke, annul, or repeal all charters of corporations then after created in this state, whenever in the opinion of the general assembly such charter is injurious to citizens of the state. The only limitation upon the power is that it

Constitution-
al provisions.

Same—
Foreign cor-
poration
bound there-
by.

shall not be so exercised as to do injustice to the corporators. It is provided that foreign corporations may be admitted to do business in the state upon certain conditions, and that upon compliance therewith they shall conduct their business subject to the same regulations, limitations, and liabilities as like corporations of this state, and shall exercise no other or greater powers, privileges, or franchises than may be exercised by like corporations of this state. The appellant purchased its line in this state subject to the provisions just mentioned. Though the statute then in force for the regulation of rates to be charged for the transportation of passengers permitted a higher rate to be charged than that allowed by the act in question, the appellant knew that all such acts were subject to legislative change. Thus warned, it elected to come into the state to operate a railroad. It thereby undertook and became bound to do it according to the terms and conditions imposed upon domestic corporations. It bound itself to the state by contract that it would conform to such rates of charges as the state might fix, provided they worked no injustice to its corporators. If the act in question violates that provision, the act must fail; otherwise, it must stand. To all other objections that may be urged against the act, it is sufficient to reply, *consensus facit jus*. We therefore pass without discussion the clauses relied upon in the federal constitution, and address ourselves to the single inquiry, do the allegations of the answer disclose that the act is unjust to the incorporators of the appellant?

For the purpose of this case, we have not felt called to decide whether the question of the justice or injustice of the act is political, and for the sole determination of the general assembly, or judicial, and subject to be investigated in the courts. Nor have we considered how far the determination of that question is controlled by the recent decisions of the supreme court of the United States in what is known as the "Minnesota Railway Cases," 134 U. S. 418, 42 Am. & Eng. R. Cas. 285. We treat it as a question within the cognizance of the court, but reserve a decision thereon until a case is presented which calls for it. We are of opinion that the answer and argument in its support rests upon erroneous conceptions of the law. It appears from the answer that the appellant operates a continuous line of railroad from Ft. Smith, in this state, to the city of St. Louis, in Missouri; that the line as owned and operated when the act in question passed comprises a road constructed by the appellants, and one purchased by it, which latter was made up by consolidating the roads of three different companies. The transportation for which the charges complained of were made was

Justice of act
regulating
charges.

over that part of appellant's road which was formerly a part of one of the consolidating roads. The answer seeks to test the justice of the act, not by its effect on the net earnings of the entire road of the appellants, but by its effect upon the net earnings of that portion of its road acquired by purchase, as well as of that part formerly owned by one of the consolidating companies. But that is not the correct test. The appellant cannot claim the right to earn a net profit from every mile, section, or other part into which its road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be remunerative. It can only claim a profit from the operation of its entire line, and attack as unjust an act that denies it the right to fix such rates as will yield a profit upon its aggregate business. The corporations owning the several parts of the road as to which it is charged that the act operates unjustly were dissolved years before it was passed. As to them it could not operate unjustly, and in their behalf no cause of complaint can exist. The lines, though once independent, are now parts of a whole, and any division of it into its original parts for the purposes of the act in question is arbitrary. There is as much reason to divide the line according to sections or stations, or into divisions of a designated mileage, and demand the right to charge for service upon each part a rate sufficient to make the operation of that part alone, independently of other parts, remunerative. If an act were to be thus tested, it would be necessary in each case to ascertain what part of the line was included in the trip, and then determine what charge was necessary to make the business of that part profitable. That would involve the ascertainment of what expense was incurred in operating the particular division alone; but as there are other general expenses, not incurred in operating any other division more than the one in question, it would be necessary to compute them, and apportion a just part to the designated division. It would then be necessary to ascertain what the road could earn at the rate fixed, from receipts arising exclusively from the business of the particular part, and its *pro rata* of receipts from business done in part over it, and in part over other divisions. It could then be seen whether the expense of operating the particular division exceeds the receipts under the rate proposed. In what proportion the several parts should share with others in the expenses and receipts in which they participated, it would be difficult to determine. In fact, the problem proposed would be difficult, if it did not baffle solution. If, upon the examination, it was ascertained that if division A could earn a profit at a rate of three cents per mile for passengers, as to it the act

would be valid; but if it was ascertained that division B would sustain a loss unless permitted to charge five cents per mile, the act as to it would be invalid. If it could be conceived that, with such an issue to be submitted to a jury, a decision would ever be reached in two different causes, a remarkable result might be anticipated. It would then be judicially determined, that a law fixing three cents as the maximum would be constitutional as regulating rates from Fayetteville to the next station south, but unconstitutional as regulating the rates from Fayetteville to the next station north. Such a condition would be rendered improbable, only because it is exceedingly improbable that two cases would be prosecuted to a termination in the life of any one person.

We think it must be evident that, to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the appellant, the earnings of its entire line must be estimated as against all its legitimate expenses, under the operation of the act. But we think that a more enlarged scope should be given the inquiry, to decide the question properly: and the justice of the act should be determined by its effects upon classes, and not by its effect upon single members of classes. The parent company was organized, and the appellant began its business in this state, after the adoption of a policy by the state with reference to corporations that marked a change in that regard. It has been usual to create corporations, grant privileges, and limit powers by special act of the legislature. It was then provided by the constitution that no special act of incorporation should be passed, and that all corporations should be formed under general laws. In pursuance of the changed policy, the act was passed providing for the organization of railway companies. As the powers of corporations were conferred and defined by general laws, so the state indicated its policy to regulate their enjoyment and exercise, by laws likewise general. The provision relied upon by the appellant from the act of July 23, 1868, authorizing railway companies to regulate passenger fares, was general in its terms, and applied to all railroads in the state. The act in question, though it classifies roads for the purpose of regulation, is general, for it prescribes the same regulations as applicable to each member of a class. It would therefore be unreasonable to test the rate fixed for any class by its effect upon a single member of the class. One member might be so situated that at a given rate of fares its earnings would be large; while another member, at the same rate, but affected by different conditions, perhaps temporary, such as destructive competition, wasteful management, or limited business, could not earn expenses. Neither

of said members—the one enjoying favorable circumstances, nor the one suffering from unfavorable circumstances—would furnish the proper criterion by which to judge the rate proposed. Whether it would be just or unjust should be determined by its effects upon those operating under usual and ordinary conditions. The appellant nowhere alleges that the rate fixed by the act in question is unjust as applied to other roads in its class, or that it cannot be adopted by them without any unjust impairment of their earnings. We think it follows, if roads may be classified for regulation, that the justice or injustice of the regulation must be determined with reference to its effect on the class, and not a particular member of it. Any other rule would lead to confusion, almost chaos, in the law. An act held valid as to one member of a class might be held invalid as to another, and no adjudication would remove or lessen the uncertainties as to the effect of an act. We do not mean to imply that the act, under the construction given it, is free from the objection that the question of its legality is undetermined after the adjudication of any one case. If the question of constitutionality is to be determined by a judicial inquiry into the reasonableness of the limit prescribed, it is obvious that the result in each case would depend upon the facts developed in it, and the conclusions drawn therefrom; thus varying as the facts in proof varied, and as different trial tribunals might differ in viewing them. It would be better for all concerned—the public, the corporations—if the law provided some means for testing the reasonableness of the rates prescribed, before they were to become operative, in a proceeding in which the corporations contesting it, and the public, through its representatives would have an opportunity to be heard. The final determination in such a proceeding should be conclusive as to that fact, and determine the legal *status* of the act, and, if it was sustained, a defense of its unreasonableness should not be entertained in an action like this. The plaintiff in an action of this character has not the facilities or interest to present the matter as it should be in a controversy so wide in its scope, affected by circumstances so universal and complex. The burden of the litigation is too great for the return. While we think the law should be as we have indicated, we cannot conclude that it is, although a somewhat similar principle was contended for by the late Justice MILLER in a separate opinion in the Minnesota cases. It was ruled in *Dow v. Beidelman*, *supra*, that the classification of roads for regulation of rates was proper.

Affirm.

Action for Damages Against Railroad Companies—Entrapping Company into Excuse for Bringing Suit.—See *Norfolk & Western R. Co. v. Irvine* (Va.), 37 Am. & Eng. R. Cas. 227, note 230.

Action for Overcharge—Effect of Voluntary Payment.—See *Cook v. Chicago, R. I. & P. R. Co.* (Ia.), 45 Am. & Eng. R. Cas. 291; *Mount Pleasant Manufacturing Co. v. Cape Fear & Y. V. R. Co.* (N. Car.), 42 *Id.* 498; *Killmer v. New York Central & H. R. R. Co.*, 23 *Id.* 656, note 662.

Legislative Regulation of Rates—Reasonableness and Justice of Statutory Regulation.—See *Wellman v. Chicago & G. T. R. Co.* (Mich.), 45 Am. & Eng. R. Cas. 249; *Chicago, M. & St. P. R. Co. v. State* (U. S.), 42 Am. & Eng. R. Cas. 285, note 316; *Minneapolis E. R. Co. v. State* (U. S.), 42 *Id.* 316.

Excessive Passenger Charges—Addition of Bridge Toll.—By the act of congress authorizing the construction of a railway bridge across the Arkansas river at Ft. Smith, Ark., it is provided that no higher charge shall be made for the transportation of passengers over the bridge than is paid for similar transportation over the railroad leading to the bridge. Act. Ark. Leg. April 4, 1887, provides that only 3 cents per mile shall be charged for carrying passengers. *Held*, that a charge of 70 cents for 11 miles of travel—30 cents for transportation 10 miles, and 40 cents for bridge toll—constituted an overcharge within the meaning of the act. *St. Louis & S. F. R. Co. v. Stevenson* (Ark. Jan. 3, 1891), 15 S. W. Rep. 22.

Evading Payment of Railroad Fare—Public Offense.—Act. Cal. April 1, 1878, § 9, provides that "every person who shall fraudulently evade, or attempt to evade, the payment of his fare for traveling on any railroad shall be fined," etc. *Held*, a violation of said act constitutes a public offense, within the meaning of Pen. Code, § 15, which provides that a "public offense is an act committed in violation of a law commanding or forbidding it, and to which is annexed * * * a fine." *Dyer v. Placer County*, (California, July 18, 1891), 27 Pac. Rep. 197.

MCVEETY

v.

ST. PAUL, MINNEAPOLIS & MANITOBA R. CO.

(45 *Minnesota*, 268.)

Passenger—Who is—Evading Payment of Fare—Fraud.—If a person knowingly induces the conductor of a railway train to violate a rule of the company, and to carry him without charge, he is guilty of a fraud on the company, and cannot claim the rights of a passenger.

APPEAL from Wright District Court.

Action by McVeety against the St. Paul, Minneapolis & Manitoba Railroad Company, for personal injuries. Judgment for plaintiff; defendant appeals.

M. D. Grover and *R. A. Wilkinson*, for appellant.

J. J. Wooley and *F. E. Latham*, (*Wendell & Pidgeon*, of counsel,) for respondent.

COLLINS, J.—On the trial of this action, it was defendant's

contention that, although plaintiff was on its train, a freight with a caboose attached, when the accident occurred in which he claims to have been injured, he was not a passenger to whom it owed any duty. Testimony was introduced tending to show that plaintiff had not paid his fare; had no ticket; that on boarding the train he had solicited the conductor, an acquaintance, to permit him to ride without paying his fare; and that the latter had consented. The defendant then offered to prove by the conductor that when soliciting that he be carried without paying his fare, the plaintiff knew that the conductor had no authority to allow it. To this offer the court sustained an objection, defendant duly excepting. This ruling was erroneous, and a new trial must be had. It is probable that there is authority for the statement that when the conductor of a train disobeys the rules of the company for which he is acting, in regard to the collection of fare from a traveller, or in respect to some other matters, such, for instance, as permitting him upon a forbidden part of the train or upon a train not allowed to carry passengers, the traveler has all the rights of a passenger, if he has no notice of the rule, express or implied, or of the conductor's disobedience. But if a person solicits and secures free transportation, or if he rides upon a part of the train from which passengers are excluded, or takes passage upon a train not allowed to carry passengers, knowing that his act is against the rules of the carrier, and in permitting it the conductor is disobedient, he is guilty of a fraud, and not entitled to a passenger's rights. *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80; *Robertson v. New York & E. R. Co.*, 22 Barb. (N. Y.), 91; *Union Pac. R. Co. v. Nichols*, 8 Kan. 505; *Prince v. International & G. N. R. Co.*, 64 Tex. 146, 21 Am. & Eng. R. Cas. 153; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174, 41 Am. & Eng. R. Cas. 100. The defendant had been allowed by the court to introduce testimony tending to establish its claim that the plaintiff had obtained the conductor's consent to his riding without payment of fare, and it should have been permitted to go further and prove, if it could, that plaintiff knew that, in securing this consent, he had induced the conductor to violate a rule of the railway company. Order reversed.

When Relation of Passenger and Carrier Exists—Payment of Fare.—See note 41 Am. & Eng. R. Cas. 63.

Old Employee Accepting Conductor's Invitation to Ride on Freight Train Without Payment of Fare—Liability of Company for Injury.—In *Powers v. Boston & M. R. Co.*, 153 Mass. 188, it was held that it is not within

the apparent scope of the employment of a conductor on a train used exclusively for transporting freight to invite persons to ride on his train, and one who accepts such an invitation, with no intention to pay fare, is not a passenger, and the railroad company is not liable to him for an injury sustained by him in a collision while so riding on the train. A rule of the company forbidding the carrying of passengers on freight trains, is infringed by the carrying of one from whom no fare is expected or collected. The fact that the injured person was an old employe of the railroad company, and that some of the conductors had permitted old employes to ride on their freight trains, is not sufficient to establish a custom which would make the company liable to him as a passenger, in the absence of evidence showing that the general officials of the road had notice of the action of the conductors, or that such action had so long continued as to give rise to a presumption of knowledge by these officials. Even if the injured person was a licensee on the train, the railroad company is not liable for his injuries.

EDDY *et al.*

v.

HARRIS.

(78 Texas, 661.)

Passengers—Sale of Ticket for Excursion Train—Contract of Transportation.—Defendant's regular ticket agent sold plaintiff a ticket good only on a special excursion train which defendant had hired to a third person and which was in his charge, and whose name was signed to the ticket. Plaintiff was not aware of the arrangement between carrier and such third person. *Held*, that the sale of the ticket constituted a contract of transportation binding upon defendant.

Failure to Carry Passenger—Excessive Damages.—The failure of the defendant to carry plaintiff as agreed caused him to lose one day's time, the opportunity of seeing a celebration, and a free dinner. *Held*, that a verdict of \$50 was excessive.

APPEAL from Hopkins District Court.

Peteet & Crosby, for appellants.

Foster & Henderson, for appellee.

STAYTON, C. J.—Appellants, as receivers, made contract with one Sparks whereby the latter was to have the use of cars on road controlled by appellants, for the purpose of transporting excursionists, on June 19, 1889, Case stated. from Sulphur Springs and Greenville to Dallas, and return. For the cars Sparks agreed to pay \$395, of which \$100 was paid in advance, and the balance was to be paid before the cars should leave the two places named. The time for leaving the several points both in going and returning was fixed by the contract with Sparks; but of that contract, or that Sparks had control of the excursion trains, appellee, on the

morning of the 19th of June, was ignorant, but she did know that an excursion train was to run on that day from the places named to Dallas, and return. The sum to be paid for the train between Sulphur Springs and Greenville, and return, and between the latter place and Dallas, and return, seems to have been fixed; and the sum paid by Sparks in advance, with such sum as was received on sale of tickets by the agent of receivers at Sulphur Springs, exceeded the sum to be paid for the train between that place and Greenville. Sparks had tickets printed which were as follows: "Round trip, June 19, 1889. Good only on special train to-day on M., K. & T. R. R., Sulphur Springs to Dallas, and return. J. SPARKS, Manager." These tickets were placed by Sparks in the hands of the receivers' ticket agent for sale; and on the morning of June 19, 1889, appellee, desiring to go to and return from Dallas on the excursion train, which she understood would go on that day, applied to that agent, who was selling tickets at the office and usual place for selling tickets, for a ticket from Sulphur Springs to Greenville, probably thinking, as there was change in the gauge of the road at Greenville, that she would have to buy tickets at each place. The agent informed her that he could not sell her a ticket for the excursion train, then standing at the depot, to Greenville, but that he could sell her a ticket to Dallas, and return; whereupon she paid him \$2.40, and received a ticket in the form above set out, she being ignorant that Sparks had any connection with or control of the train. The sum paid was the excursion rate from Sulphur Springs to Dallas, and return. After purchasing the ticket, appellee entered a car, and the train proceeded to Greenville, there being many other persons on board situated as was appellee. When the train reached Greenville, Sparks having failed to pay the sum he had agreed to pay before the train should leave that place, the officers of the road refused to send the excursion train through; but, on payment of \$1.55, appellee was carried to Dallas, and returned to Sulphur Springs, which she reached on the same train and at same time she would have reached that place, had the excursion train gone from Greenville to Dallas, as at first contemplated in the agreement between Sparks and appellants. There was, however, some delay at Greenville, and the train on which appellee went to Dallas did not reach that place by about three hours as early as it would had the excursion train gone through, as contemplated by the agreement with Sparks. It further appears that the train on which appellee returned from Dallas left that place about 5 o'clock P. M. on June 19th, when it was not contemplated that the train which Sparks had contracted for would

leave Dallas before midnight. The purpose of those going on the excursion was to attend the anniversary of emancipation; and appellee, on account of the delay at Greenville, may not have witnessed the ceremonies attending the celebration, and, further, did not arrive in time to partake of a free dinner which she might have received had she arrived at the time the excursion train would have gone through, as contemplated in the agreement with Sparks. Judgment, on this state of facts, was rendered in favor of appellee for \$50.

It is urged that the court below erred in holding that, under the facts, the receivers were bound, under the act of their agent, to transport appellee to Dallas, and return, for the sum paid to that agent. We are of opinion that there was no error in this respect, and that when appellee paid to the agent of the receivers, at their office, where he, in the usual place and course of business, sold tickets, the sum which he demanded for transportation to and from Dallas, a contract binding on appellants was made, and that for their violation of it appellee had cause of action. Appellee was ignorant of the agreement between appellants and Sparks; and the fact that the ticket given to her was signed, "J. Sparks, Manager," was not sufficient to charge her with notice of it. When the agent of a railway company, or of receivers in charge of a railway, receives the money of one desiring to become a passenger from one point to another, then a contract binding on the company or receiver exists; and it may well be doubted if knowledge of appellee that Sparks had contracted for the train on that day would affect the question; for, if his right to the train was not fixed, such agent ought not, in the usual course of business, to receive the money of one desiring to become a passenger. If Sparks had complied with his contract, its breach by appellants would have given to one who had purchased tickets for that day a cause of action; and, if appellee had known of Sparks' contract, the acts of appellants' agent would be equivalent to a declaration that he had complied with it.

Contract
binding on
defendant.

It is urged that the judgment is excessive, and we are of opinion that there are no facts stated in the court's conclusions of fact sufficient to sustain the judgment. Appellee is entitled to recover the sum paid by her at Greenville, with interest thereon, as damages; and, as the purpose of her visit to Dallas was practically defeated by the delay at Greenville, to compensation for loss of time, which may embrace the entire period from time of her leaving Sulphur Springs till her return; but this is the extent of her right, under the facts shown. Because

Damages
exclusive.

the judgment is excessive, it will be reversed, and, as there is no finding of fact on which judgment can be here rendered, the cause will be remanded.

Liability of Railroad Company to Passengers Traveling on Excursion Train under the Management of a Third Party.—See *McRae v. Wilmington & W. R. Co.* (N. Car.), 18 Am. & Eng. R. Cas. 316; *Howard v. Chicago, St. L. & N. O. R. Co.* (Miss.), 18 Am. & Eng. R. Cas. 313.

"Round Trip Ticket"—Return Coupon—Validity in Hands of Passenger from Original Holder.—After a "round trip" or "excursion" railroad ticket has been used by the holder in going one way over the route, it is good in the hands of a purchaser from the original holder, for the return trip, there being no condition in the contract to the contrary. *Hoffman v. Northern Pacific R. Co.*, 45 Minn. 53.

KANSAS CITY, MEMPHIS & BIRMINGHAM R. CO.

v.

RILEY.

(Mississippi Supreme Court, June 1, 1891.)

Passengers—Return Trip Ticket—Wrong Coupon—Mistake of Conductor.—By accident and mistake, the conductor of a railroad train returned to a passenger who presented a return trip ticket, the wrong part thereof. On the return trip the passenger presented that portion of the ticket which had been so returned, but the conductor refused to accept it. The passenger had not before noticed the mistake, but then explained to the conductor how it occurred. The conductor refused to carry the passenger without the payment of fare. This was refused and the passenger was expelled at a regular station. *Held*, that the company was liable, since, if it had a regulation authorizing its conductors to disregard such statements by passengers, it was unreasonable.

APPEAL from Lee's Circuit Court.

Wallace Pratt, Gen. Sol., and *J. W. Buchanan*, for appellant.
Blair & Stribling, for appellee.

COOPER, J.—On or about the 3d of September, 1889, the plaintiff with her husband purchased from the agent of appellant at Myrtle two tickets for transportation over appellant's road to Blue Springs and return; Myrtle and Blue Springs being stations on appellant's road. These tickets were handed to the conductor on the train running from Myrtle to Blue Springs, and by accident and mistake he returned to the passengers the wrong part of the tickets, giving to them that portion which called for transportation from Myrtle to Blue Springs, which he should have kept, and retaining that portion calling for passage from Blue Springs to Myrtle, which he should have returned to the

passenger. The plaintiff went from Blue Springs to Sherman, another station on appellant's road, and on the 6th of September, being desirous of returning to Myrtle, she purchased a ticket from Sherman to Blue Springs, and for the journey from that place to Myrtle tendered that portion of the round-trip ticket from Myrtle to Blue Springs that had been returned to her by the conductor on the 3d, but this ticket the conductor refused to accept, because it entitled the bearer to transportation from Myrtle to Blue Springs, but not from Blue Springs to Myrtle. The plaintiff had not noticed the mistake that had been made by the other conductor, but then explained to the conductor of the train upon which she was traveling how it had occurred, and insisted upon her right to be carried on the ticket. But this he declined, and informed the plaintiff that she must either pay train fare, buy a ticket at Blue Springs when the train should reach that point, or leave the train at that point. The plaintiff and conductor testified to about the same facts as to what transpired until the train reached Blue Springs, at which point the conductor stated that plaintiff and her husband left the train upon his refusal to carry them on the tickets they then had, while the plaintiff testified that the conductor spoke to her in an angry manner, and took her by the arm to put her off the train. At all events, the plaintiff left the train at Blue Springs with her husband, and there remained until the following day, and brings this suit for damages against the appellant. The jury awarded her damages in the sum of \$300, and from a judgment for that sum the defendant appeals.

The decisions are in direct and palpable conflict upon the liability of a common carrier for failure to transport a passenger under the circumstances named. In New York, Michigan, Illinois, Maryland, Ohio, Wisconsin, Connecticut, New Jersey, Massachusetts, and North Carolina, it seems to have been decided that the ticket presented by the passenger is the only evidence of his right to travel upon the train which can be recognized by the conductor; and that if, by reason of the negligence of other servants of the carrier, a wrong ticket has been given to the passenger, or the right ticket has been given to him, but erroneously taken from him, the passenger's right of action is for the wrong thus committed: and that he may not insist upon his right to travel on the wrong ticket, or without it, where it has been taken up, and recover damages for the refusal of the carrier to permit him to do so; and that the carrier may lawfully eject him from its train, using no more force than is necessary to that purpose. The authorities in support of this rule are found in the brief of counsel for appellant. On the other hand, it

Authorities
reviewed.

is held in Georgia and Indiana that the passenger is entitled to travel according to his real contract with the carrier, where the mistake in giving the proper ticket, or in taking up a proper one held by the passenger, is caused by the negligence of the servants of the carrier. In a more recent case in Michigan than those cited by appellant's counsel,—*Hufford v. Grand Rapids & I. R. Co.*, (Mich.) 28 Am. & Eng. R. Cas. 129,—the plaintiff had applied and paid for a ticket from Manton to Traverse City. The agent gave him a ticket previously issued for a ride from Sturgis to Traverse City. There was evidence tending to show that the ticket had been canceled by conductor's marks for a ride between Sturgis and Walton, and the trial court instructed the jury that "if they believed the ticket was punched, indicating to the conductor by the punch mark that it had been used before between Grand Rapids and Walton, that would be evidence of an infirmity in the ticket, and the plaintiff would not be entitled to insist upon that ticket being received." This instruction was held to be erroneous; the court saying: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks." The most remarkable thing about this decision is that it was made in the same case, upon the same facts, and between the same parties as that reported in 53 Mich. 118, in which, in an opinion delivered by Judge COOLEY, it was held that, as between the conductor and the passenger, "the ticket must be conclusive evidence of the extent of the passenger's right to travel." There is a class of cases somewhat analogous to the present one, in which by a uniform course of decisions, so far as we are informed, it is held that the conductor must accept the statements of the passenger. We refer to those cases in which different rates are charged for one who has procured a ticket and one who pays upon the train. It is held that as a condition precedent to the exercise of this right to charge higher train rates, and to expel one refusing to pay them, a reasonable opportunity should be given by the carrier to the passenger to procure the ticket required, and that one to whom no such opportunity has been afforded, and who for refusing to pay the higher rate is expelled from the train, may recover damages therefor. *Hutch. Carr.* § 571, and authorities in note 2; *Forsee v. Alabama & G. S. R. Co.*, 63 Miss. 66.

Without determining more upon this disputed question

than is necessary for the decision of the case before us, it is sufficient to say that where, as here, the ticket in the hands of the passenger supports and confirms the truth of his statement, and no possible injury can result to the carrier by the conductor's accepting and acting thereon, he must so act, or refuse at the peril of inviting an action for damages against his principal if the statement be true. We do not decide that a person holding a ticket from Myrtle to Blue Springs has a right to ride from Blue Springs to Myrtle; but no real injury could result to the carrier in recognizing such right, for the distance is the same, and in the usual course of business as many trains pass in one direction as the other. What we do decide is that a passenger holding and attempting to use such ticket, under the circumstances disclosed in this record, and explaining to the conductor how the mistake occurred by which the ticket read in the wrong direction, makes such a reasonable and proper showing as entitles him to be dealt with as a passenger, and therefore that any regulation of the carrier authorizing the conductor of its trains to disregard such statement is unreasonable, and need not be submitted to by the passenger.

Passenger entitled to recover.

We find no error in the record for which the judgment should be reversed and it is affirmed.

Return Tickets—Detachment of Wrong Coupon by Conductor.—In a Maryland case the conductor detached and cancelled the wrong coupon of a passenger's round trip ticket. The conductor noticed his mistake, and returned such coupon to the passenger, having endorsed thereon the words "cancelled by mistake," and told him that it would be all right and that he could ride upon it. On his return trip the passenger attempted to use this coupon, explaining to the conductor how the mistake occurred. But it was refused, and on the passenger declining to pay his fare, he was expelled from the train. The court held that he had a cause of action against the company. *Philadelphia W. & B. Co. v. Rice*, 64 Md. 63, 26 Am. & Eng. R. Cas. 264.

In Indiana it is held that a passenger is entitled to damages for refusing to pay fare on a train, demanded by a conductor to whom he has presented the wrong half of a round trip ticket, which had been erroneously returned to him by a brakeman who took up the tickets on his outward journey. *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 11 Am. & Eng. R. Cas. 109.

In another case it appeared that, a passenger on a train to Mooresville from Indianapolis presented to the conductor the going instead of the returning coupon of a round trip ticket from M. to I., which he had purchased at M. three days before. The coupon was refused by the conductor who informed him that it was the wrong end. Upon the refusal of the passenger to pay his fare he was ejected from the train. The passenger in an action for damages testified that upon the conductor informing him that the coupon presented was the wrong end, and refusing to accept it, he explained that it was the first knowledge he had of the mistake, and that it was the mistake of the conductor on the trip to I., who had taken the wrong end. The defendant contended that no explanation was made.

Upon these facts, the jury were told in effect, by two instructions, when taken together, that if the conductor retained the wrong coupon the passenger would have the right to rely on his act, and would be entitled to use the other end on the return trip, but that without an explanation he had no right to be carried, and that upon his refusal to pay his fare the conductor would be justified in ejecting him. *Held*, that there was no error. *Pennsylvania Co. v. Bray*, 125 Ind. 229.

Mistake by Agent in Selling Ticket—Ejection of Passenger—Damages.—A party purchasing a railroad ticket has a right to rely upon the agent of the company to give him a proper ticket when called and paid for, and, no particular circumstances intervening, there is no duty upon the party purchasing to examine the same and any mistake which may occur, is chargeable to the railroad company, and not to the person receiving or purchasing the ticket. Accordingly, where a passenger is given a ticket to the wrong place, but has his baggage checked to his destination, he may recover for his expulsion by the conductor, who is informed of this circumstance and of his inability to pay the fare. For his expulsion in such case at a way station, the passenger may recover additional damages under Code Ga., Sec. 3066, allowing such where there are aggravating circumstances. *Georgia R. & B. Co. v. Dougherty* (Ga. Dec. '20, 1890), 12 S. E. Rep. 747.

Expulsion of Passenger for Failure to Pay Fare—Right to Rely on Conductor's Statement as to Amount he Would be Required to Pay.—Where a passenger enters a railroad train at a flag station and is told by the conductor that he will pay four cents per mile to the next station where tickets are sold, or that he can get off the train there and board it again and ride the rest of the way for three cents per mile (the regular rate), the passenger has a right to rely upon such statements, and if he gets off at the station in question but fails in his attempt to get a ticket owing to the absence of the agent, and boards the train again and is ejected for his failure to pay four cents per mile for the remainder of the way, the railroad company is liable for damages. The fact that the conductor showed the passenger his rule book containing a notice of the Georgia Railroad Commission which provides that "the regulation of the railroads as to passengers without tickets is a matter of police, with which the commission will only interfere upon complaint of abuse; an extra charge of more than one cent per mile, full fare, or one-half cent, half fare, is regarded as excessive, unless such extra charges would fall below the minimum above given," is not notice as to the conductor's authority to make such representations to the passenger. *Georgia R. & B. Co. v. Murden* (Ga., Dec. 23, 1890) 12 S. E. Rep. 630.

Scalper's Ticket Conditioned to be Void if Transferred—Right to Collect Fare.—In *Drummond v. Southern Pacific Co.* (Utah, Feb. 3, 1891), 25 Pac. Rep. 733, the plaintiff attempted to ride upon a ticket purchased by him from a ticket broker. The ticket so purchased contained a condition that it would be void if presented by any other than the original holder, and that if so presented it would be taken up and full fare collected. The plaintiff purchased this ticket on the assurance of an unauthorized agent of the company that it would be honored. This class of tickets were usually signed by the original purchaser, but the one in question was not. When plaintiff presented his ticket, the conductor refused to accept it and compelled him to pay his fare. *Held*, that the plaintiff had no cause of action against the company, and the fact that the ticket was not signed was of no moment, since by accepting it the original purchaser was bound by its terms. The court said: "The question is, was it the duty of the defendant to honor these tickets although presented by persons other than the original purchasers? They were through tickets, and were sold for a

less price than the local fare; and the purchasers agreed not to sell them, and the ticket stated on their face that they were non-transferable. The purchaser, when he bought these tickets, knew that he had no right to ride part way upon them, and sell them for the rest of the way; and the plaintiff knew, by the terms of the tickets, that he had no right to buy them; but, anxious to ride to his destination for less than the regular fare, he considered the matter, and bought on the opinion of a man wholly unauthorized to bind the defendant company. And his suspicions should have been aroused by the conduct of the pretended agent, because, if the tickets were entitled to be honored on their merits, a letter to the conductor was unnecessary, and, if not, the officious letter of the pretended agent would be unavailing, and this ought to have suggested to him that the tickets would be dishonored unless by the influence of this letter the conductors would be induced to neglect their duty. This class of contract tickets is valid, and common carriers are authorized to enforce them. *Post v. Chicago, etc., R. Co.*, 14 Neb. 110, 9 Am. & Eng. R. Cas. 345; *Elmore v. Sands*, 54 N. Y. 512; *Boston & M. R. Co. v. Chipman*, 146 Mass. 107, 34 Am. & Eng. R. Cas. 336; *Hill v. Boston, H. T. & W. R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 87; *Cody v. Central Pac. R. Co.*, 4 Sawy. (U. S.) 114.

"But it is contended that the ticket agent at Blue Rapids, Kan., sold without requiring the purchaser to sign the contract. We think this makes no difference. He took them at a less price than the regular fare. The terms of the contract are set out in full, and we think, by accepting the ticket without signing, he accepted the terms of the contract, and was bound by them. *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, 485; *Gulf C. & S. F. R. Co. v. McGowan*, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274; *Mosher v. St. Louis, I. M. & S. R. Co.*, 127 U. S. 391, 34 Am. & Eng. R. Cas. 339. The court instructed the jury in opposition to these views, and in that regard his instructions are erroneous. We also think there is no evidence in the record to support the verdict."

Commutation Ticket Issued to Members of Partnership—Endorsement of Name—Proof of Existence of Partnership.—When a person claiming the right to travel on a train of a railroad company as a passenger holding a commutation ticket issued by the agent of the company, on the alleged ground that he is one of the members of the partnership named on the face of the ticket, he must show the conductor that his name appears indorsed thereon, in compliance with the conditions specified in the contract on the reverse of the ticket. In case the conductor of the train should decline to recognize his right to thus use the commutation ticket, and should eject the holder, and damages are judicially claimed therefor, the legal obligation is imposed on the claimant to establish by a clear preponderance of proof, if denied, that there existed such a partnership at the time, and that he was one of its members. *Granier v. Louisiana W. R. R. Co.* (La. July Term, 1890), 8 S. Rep. 614.

Ticket "via Direct Line"—Authority of Ticket Agent—Meaningless Condition.—When a railway company intrust an agent with the sale of their tickets, they clothe him with the apparent authority to explain to the purchasers of such tickets the purport or effect of any condition or provision thereon, which would be unintelligible without such explanation, and also their rights under such tickets, having regard to such provision or condition. And where such an agent sold a ticket "via direct line" between two places, and there were three different routes between the places operated by the company, none of them being direct, and one of which was shorter than the others, and the agent in selling the ticket gave the purchaser to understand that he might travel under the ticket by any one of the three lines, and in doing so by one of the longer routes, he was forced

bly ejected from the train for declining to pay an extra fare: *Held*, that the provision "via direct line" was unintelligible without explanation and that the company were bound by the representation of their agent in relation thereto: *Held*, also, that the words "via direct line" were inapplicable to the contract and must be struck out in construing it. *Dancey v. Grand Trunk R. Co.*, 20 Ont. 603.

WARDWELL

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(*Minnesota Supreme Court, July 7, 1891.*)

Passenger—Payment of Fare—Mistake of Conductor—Expulsion.—Plaintiff, without a ticket, though he had full opportunity to procure one, boarded defendant's train at Faribault, to go to Owatonna, and, when he told the fare collector where he was going, the latter told him the fare was 50 cents, which he paid. This was more than the ticket fare, but 6 cents less than the train fare. Before the train arrived at Walcott, the first station at which the train was to stop, the collector informed plaintiff of his error in the amount of the fare, and required him to pay the 6 cents, which plaintiff refused, and the collector told him unless he paid it, he must leave the train. On arrival at Walcott, where the train stopped, the plaintiff persisting in his refusal, the collector put him off, and then returned him the 50 cents, less the fare from Faribault to Walcott. *Held*, that the collector, on discovering the mistake, might, within a reasonable time, require plaintiff to pay the other 6 cents.

Also that, notwithstanding his first refusal, the plaintiff might, at any time before the arrival at Walcott, still pay the 6 cents, and secure the right to be carried to Owatonna.

Also that the collector's retention of the 50 cents till the arrival at Walcott was not a waiver of the right to require payment of the 6 cents. *Qualifying Du Laurans v. Railroad Co.*, 15 Minn. 49, (Gil. 29.)

Also that the company had a right to be paid the fare from Faribault to Walcott, and the collector might retain it out of the 50 cents. *Overruling De Laurans v. Railroad Co.*, 15 Minn. 49, (Gil. 29.)

Also that the collector could not retain the entire amount, and also put plaintiff off, but could put him off only upon first returning to him the 50 cents, less the fare to Walcott, and, having put him off before doing so, the expulsion was wrongful.

APPEAL from Steele District Court.

F. W. Root, (*W. H. Norris*, of counsel), for appellant.

Amos Cogswell and *Sawyer & Sawyer*, for respondent.

GILFILLAN, C. J.—The plaintiff, without procuring a ticket, though he had full opportunity to do so, boarded a passenger train of defendant at Faribault to go to Owatonna.

Case stated The ticket fare was 46, the train fare 56, cents. Soon after the train started the fare collector came to plaintiff, and asked him where he was going, and, on being told to

Owatonna, said the fare was 50 cents, which plaintiff then paid him. A few minutes after, and before the train reached Walcott, the first station from Faribault, the collector came again to plaintiff, and told him he had made an error in the amount of the fare, and insisted that he should pay the other 6 cents, and, on plaintiff refusing, told him unless he paid it he would put him off the train. Plaintiff still refused, and on the arrival of the train at Walcott, plaintiff persisting in his refusal, the collector put him off, and, after he was off, returned to him the difference between the 50 cents and the fare from Faribault to Walcott. Assuming (what, in view of the defendant's regulations posted up in its passenger stations and passenger cars, can hardly be assumed) that the collector had authority to accept for the fare any less than the 56 cents, and waive the company's right to full train fare, the receipt by the collector, through mistake for the full fare, of less than the fare, did not amount to such waiver. The collector had a right, on discovering the mistake, to require the plaintiff, certainly within a reasonable time, on informing him of the error, to pay the remainder of the train fare, just as any one on discovering a mistake in payment may, within a reasonable time, require its correction. And it was the duty of the plaintiff, on being informed of the error, to pay the remainder of the full train fare, as demanded by the collector. Nor was the collector's retention of the money paid him by plaintiff (still assuming his authority to waive any part of the train fare) until the arrival of the train at Walcott, and while the question whether the plaintiff would pay the remaining 6 cents or leave the train was an open one, (for, notwithstanding his previous refusal, the plaintiff might, until the arrival at Walcott, where the train was to stop without regard to his matter, still pay and secure the right to go to his intended destination,) such a waiver, and especially as the collector insisted on payment of full train fare, and informed plaintiff that he must pay or leave the train. The rule laid down in *Du Laurans v. Railroad Co.*, 15 Minn. 49, (Gil. 29.) to the effect that when a passenger tenders in good faith, on the train, the ticket fare as full fare to his place of destination, and the conductor takes and retains it, he thereby waives the right to require the passenger to still pay the difference between the ticket and train fare, is (assuming the conductor's authority to waive it) undoubtedly correct as applied to a case where, from the circumstances attending the tender, receipt, and retention of the money, the passenger is justified in the belief that it was accepted in full for his fare to the place of his

Collector
might correct
mistake.

Retention of
money by col-
lector not
a waiver.

destination. Thus, if the conductor should receive and retain it without demanding more, till the train had passed the place at which he must exercise or abandon the right to eject the passenger for non-payment, the latter would have the right to assume that the amount paid was satisfactory. But it cannot correctly be applied to a case like this. It would be equivalent to the proposition that the collector waived payment while insisting upon it, a proposition contradicting itself.

To determine whether he would pay the difference demanded or persist in his refusal and leave the train, the plaintiff had until the train stopped at a place where he might be put off. So long as he had that election, the collector might retain the amount paid him to abide it. As soon as it was made, to-wit, when plaintiff finally refused at Walcott, the right of the collector to retain the entire sum paid ceased, except he chose to retain it for the very purpose for which it was paid him; that is, for the full fare to Owatonna. He could not retain the entire sum, and also eject the plaintiff. As precedent to the right to expel him from the train, he should have returned to plaintiff what he was entitled to of the money, and until he did that

**Collector
might retain
proper fare
for distance
travelled.**

**Collector
should have
returned
money before
expulsion.**

he had no right to put him off. It is true he returned it to him immediately after the expulsion. But the wrong had then already been committed, and could not be repaired by doing what ought to have been done before the expulsion. We have said the collector ought to have returned to him what he was entitled to of the money, (not the whole of the money,) because we hold that where a passenger refuses to pay the fare rightfully demanded of him to his place of intended destination, and the carrier puts him off at a proper place, because of such refusal, the carrier has a right to be paid the proper fare for carrying him to that place, and to retain it out of any money the passenger may have paid on account of fare. This is contrary to what was decided (the court being divided upon it) in the *Du Laurans Case*. The reasons given for the decision in that case were that the passenger does not intend to make a contract to be carried to the place short of his intended destination, where he is put off, and that the carrying the passenger in that case to the place where he was put off was no benefit, but, on the contrary, a detriment to him. When, under circumstances that imply a request, a railroad company carries a passenger from one point to another, it is no concern of the company, as affecting its rights to compensation, that it is or is not to the advantage of the passenger to be carried to and left at the latter

place, and it is therefore immaterial. The sole question is, was the service rendered at the request, express or implied, of the passenger? When one voluntarily enters a train of cars, and expressly requests to be carried to a particular place, but refuses to pay the rightful fare to that place, so that the company has a right to put him off before reaching that place, a request must be implied to be carried to the place where the company may rightfully put him off. His intention must be taken to be to ride to the destination expressed by him, if the company will carry him to that place, without his paying the fare, and, if it will not, then to ride to such place where the company may rightfully put him off and does put him off. That in such case he may be carried to and left at such place is what he must be presumed to expect and intend. And, he can have no right to expect that the company will put him off, till the train reaches its first regular stopping station. The train need not stop for the mere purpose of putting him off. The facts upon which we hold that the expulsion of the plaintiff from the train was wrongful were established at the trial, and not disputed, so that he was entitled to a verdict. The instructions of the court, assigned as error, going only to the right to a verdict, were therefore, if erroneous, harmless. We see no error in the instructions touching the measure of damages.

Order affirmed.

BREWER

v.

NEW YORK, LAKE ERIE & WESTERN R. CO.

(124 New York, 59.)

Passenger—Express Messenger—Effect of Contract Between Express Company and Railroad Company.—An express messenger, carried by a railroad company in pursuance of a contract between it and the express company, and ignorant of a stipulation therein limiting the liability of the railroad company, is a passenger, and such contract cannot relieve the railroad company from the same duty to protect him that it owes to any other passenger, or for the same liability for negligence. Such passenger is not chargeable with knowledge of the stipulation of the contract by which it is claimed that the railroad company is exempt from liability for negligently causing his death.

APPEAL from Supreme Court, General Term, Fourth Department.

D. C. Robinson, for appellant.

Frederick Collin, for respondent.

BRADLEY, J.—The plaintiff's intestate was an express messenger in the service of the United States Express Company, and, as such, occupied the express car in a train

Case stated.

upon the defendant's railroad, on January 23, 1881, when a portion of the train, including such car, was derailed, and he lost his life. The jury found that this was occasioned solely by the negligence of the defendant. The principal ground alleged by way of defense was that the defendant was exempt from liability by virtue of an agreement made between the Erie Railway Company and the express company, in 1877, to the rights of that railway company in which, and to its franchises, the defendant had succeeded. That was a contract for the transportation of property for the express company, and for that purpose the railway company agreed to provide suitable facilities. The third clause of the contract, upon which the main question for consideration arises, was as follows: "The railway company agrees that, between all stations on its main and leased line and branches, it will carry, free of charge to said express companies, its messengers, wagons, horses, and grain, not exceeding three car-loads in any one month, and as well all packages of money, bank notes, bonds, gold, bullion, jewelry, and other precious articles, including the safes in which such packages shall alone be transported; and in consideration of such free carriage, said express company hereby assumes all transportation risks, and other liabilities whatsoever arising in respect thereof, and agrees to fully indemnify and protect the railway company therefrom." This provision, in its relation to property which the railway company should transport pursuant to the contract, did not have the effect to relieve or indemnify it against liability for loss or injury which should be occasioned by its negligence. The intent to accomplish that purpose cannot be inferred from general words, but must be distinctly expressed in the contract with the common carrier. *Magnin v. Dinsmore*, 56 N. Y. 168; *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180; *Nicholas v. New York Cent. & H. R. R. Co.*, 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103.

It is said that this provision of the contract, in its application to the express messenger referred to in it, is not entitled to such application and effect, and that, by it, the defendant was exempt from liability for his personal injury and death, although caused by its negligence. It is true that a carrier of persons is not subjected by law to the obligations of a common carrier, nor is a carrier of persons a "common carrier," in the strict sense of the term applicable to it. While the latter, in transportation of property, is an insurer of its

Limitation of railroad company's liability by contract.

safe transit, when the obligation is not qualified by contract, the negligence of the carrier of persons is essential to liability for injury to them. The settled doctrine in this state is that a carrier of persons as well as of property, and known as a "common carrier," may, by contract, have protection against liability for injury caused by its negligence. *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263. But in view of the fact that the liability of a carrier to a passenger can rest on no ground less than that of negligence, it renders it unnecessary to make the stipulation of the contract definite and distinct in that respect, for its relief from liability is not necessarily the subject of inquiry or consideration on this review. It may, however, be observed that, in those cases where the defense has been sustained, the contract has, by its terms, plainly guarded the carrier against liability for injury resulting from its negligence. The provision before mentioned of the contract contains no stipulation expressly exempting the railway from liability arising from that cause. But, in a later clause of the contract, it was provided that "the railway company agrees to assume the responsibility of railway companies in transporting express freights, such responsibility being however, expressly limited to cases of negligence in running and handling its trains. But in no event, whether of negligence or otherwise, shall the railway company be responsible, and it is hereby released from, and the express company hereby assumes, all liability for money, bank-notes, jewelry, bullion, and precious packages hereinabove provided to be carried by the railway company free of charge." This is the only provision of the contract specifically expressing any relief from the consequences of the negligence of the last named company, and it may be that its protection from liability from such cause was intended to be limited by, and made dependent upon, that clause. And, in that view, the provisions of the third clause of the contract, may have been intended to furnish the means of indemnity to the railway company, so far as the express company assumed the risk and undertook to indemnify and protect it from liability. These considerations bear upon the construction of the last mentioned provision of the contract, and, if the messenger had been advised of it, the question may have arisen whether, in its application to him, the liability of the defendant would be deemed to have been any less qualified than in its relation to the property to which, in common with him, it there related; that it to say, whether the general words, apparently applied to the property, and to him, with-

Effect of messenger's ignorance of stipulation.

out discrimination, were entitled to a more extended import, as to the messenger, than could be given to them in their application to the other objects to which they, in the same connection, also equally related. It, however, does not appear that the plaintiff's intestate had any knowledge or information of the provisions of the contract between the two companies. When he entered into the service of the express company, he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption, or implied understanding, that the messenger took upon himself the risks of injury he might suffer from the negligence or fault of the defendant. He was in no sense the employe of the defendant, nor could he, without his consent, be subjected to the responsibilities of that relation. *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 37 Am. & Eng. R. Cas. 46. He was lawfully in the car, having the charge of the property and business there of the express company under its employment; and, although he paid no fare to the defendant, was carried by virtue of no contract made by him personally with the latter, and must have understood that he was there pursuant to some arrangement of his employer with the defendant, he was not necessarily by that fact chargeable with notice of the provisions in question of the contract. Presumptively, he was entitled to protection against personal injury by the negligence of the defendant. *Blair v. Erie R. Co.*, 66 N. Y. 313; *Nolton v. Western R. Co.*, 15 N. Y. 444; *Smith v. New York Cent. R. Co.*, 24 N. Y. 222, 29 Barb. (N. Y.) 132; *Collett v. London, etc., R. Co.*, 16 Adol. & E. (N. S.) 984. And it is not seen how Brewer could, without his knowledge or consent, be placed in such relation to the defendant as to relieve it from liability to him for the consequences of its negligence affecting him personally. His contract of employment with the express company for its service did not, so far as appears, impose upon him such hazards, nor was he chargeable with the stipulations in the contract between those companies, except so far as they, through notice to him, or otherwise, entered into that pursuant to which he went into, or remained in, the service of the express company. The negligence of the defendant was in violation of its duty. It was the want of the care to which the plaintiff's intestate was entitled for his protection. This duty, and such right did not depend or rest upon contract, but upon the relation as carrier of the plaintiff, and the care which the defendant as such, was required to exercise. It is violated duty that furnishes the ground of an action for negligence, and where there is no duty, there is no liability for such cause. We are

Messenger entitled to rights of passenger.

unable to see, in principle, any legal support for the proposition that a person entering into a contract of service with one employer may, without his knowledge or assent, be made to assume the hazards of a service conducted by another, and in which he is not engaged, and be personally subjected to the consequences of the negligence of the latter, without remedy against him. No such question was in the case of *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562, 18 Am. & Eng. R. Cas. 162, which arose out of the same disaster.

The contract between the companies did not purport to relieve the defendant from its duty to exercise due care for the protection of the messenger. Nor did the defendant take from it any right to disregard such duty; but whatever right to relief from the consequences of its negligence in that respect the defendant derived from the contract arose, by way of indemnity, upon the stipulations of the express company. These views lead to the conclusion that the question of negligence, (which fact was supported by evidence) was properly submitted to the jury; and the charge of the court to them "that the extent of the defendant's obligation to the deceased was to use ordinary care" was as favorable to the defendant as could be required by it. The deceased was a passenger, and therefore the refusal of the court to charge to the contrary was not error. *Blair v. Erie R. Co.*, 66 N. Y. 313. The location of the express car in the train did not deny to him the benefit of that relation. No other question requires consideration. The judgment should be affirmed. All concur, except FOLLETT, C. J., not sitting.

Express Messenger on Railroad Train Stands in Relation to Passenger.—See note, 41 Am. & Eng. R. Cas. 70. As to stipulations limiting liability of railroad company for injury to express messenger, see *Bates v. Old Colony R. Co.* (Mass.) 34 Am. & Eng. R. Cas. 355.

McGOFFIN

v.

MISSOURI PACIFIC R. CO.

(*Missouri Supreme Court, January 19, 1891.*)

Passenger—Death of Postal Clerk—Statutory Penalty for Death.—A United States postal clerk upon a railroad train occupies as advantageous a position as a passenger, if he is not in fact one. And if he is killed, owing to the negligence of the railroad company, it incurs the penalty of \$5,000 imposed by statute for the death of any one occasioned by the negligence of its officers or agents in running the train, etc.

Same—Collision—Presumption of Negligence.—Where a passenger on a railroad train is injured owing to a collision, a case of *prima facie* negligence on the part of the railroad company arises; and in an action for such injury, if this presumption is un rebutted and undisputed, it is the duty of the court to direct the jury to find a verdict for the plaintiff.

APPEAL from Jackson Circuit Court.

Action for \$5,000 damages for the death of plaintiff's husband, caused by a collision of two of the trains of the defendant. The cause was tried on this stipulation: "(1) Elijah H. McGoffin, the husband of the plaintiff, was killed by a collision between two trains of cars of the defendant on the line of the defendant's railroad, between Greenwood, Jackson county, Mo., and Pleasant Hill, Cass county, Mo., on the morning of November 27, 1886. (2) At the time of the death of said McGoffin he was in the employ of the United States of America as a postal clerk, and was in one of the mail cars attached to one of the trains of the defendant, and was *en route* from St. Louis, Mo., to Kansas City, Mo.; and said passenger train and a certain other train belonging to the defendant, and running on its road, collided at the time and place aforesaid, and in the collision the said Elijah H. McGoffin was instantly killed. That the said Elijah H. McGoffin paid no fare for his transportation, but was on the postal car as an employe of the post office department of the government of the United States, with which the defendant had a contract for the transportation of mails and postal clerks." To further sustain the issues on her part, plaintiff testified substantially as follows: That she was 37 years old. Had been married to deceased 15 years. Had 4 children; the oldest 14, and the youngest 2 years of age. That her husband, at the time of his death, was employed as a postal clerk by the United States government, and had been so employed over a year, and received a salary of \$75 a month. That her husband left no fortune, and all they had to depend upon was his salary. There was no provision left her by her husband. That they had a few hundred dollars, but they had to depend on his (her husband's) salary for a living. That her husband was killed November 27, 1886. This was all the testimony offered. Whereupon the plaintiff, by leave of court, dismissed as to the second count of the petition. Whereupon, at the instance of plaintiff, the court instructed the jury as follows: "(1) The court instructs the jury that, under the undisputed evidence in the cause, the plaintiff is entitled to recover, and the verdict of the jury should be in her favor for five thousand dollars." The court refused instructions in the nature of a demurrer to the evidence, and looking to a recovery of a less sum than \$5,000.

The jury found for the plaintiff in that sum; hence this appeal. The answer was simply a general denial.

Adams & Buckner, for appellant.

Warner, Dean & Hagerman, for respondent.

SHERWOOD, J.—The stipulation already set forth is sufficient in and of itself to shift the burden of proof from the shoulders of the plaintiff to those of the defendant, since the facts admitted therein made out a case of *prima facie* negligence on the part of the defendant; and, this being un rebutted and undisputed on the part of the latter, it was the duty of the court to direct the jury to find a verdict for the plaintiff. There was no other course left for the court to pursue. This position is supported both by reason and authority. And it is equally well settled that the deceased husband occupied as advantageous a position as a passenger, if he was not in fact one. He certainly was not an intruder. He was there by virtue of a contract made with the United States government for the transportation of the mails and postal clerks, and he was one of those clerks. The fact that the government had contracted for his transportation along with the mails, to take charge thereof, did not make him any the less a passenger, nor diminish the duty which the defendant owed him to carry him safely. Privity of contract is non-essential in such cases. The case of *Pennsylvania R. Co. v. Price*, 96 Pa. St. 256, 1 Am. & Eng. R. Cas. 243, is not at all analogous to the present one; for there a special statute controlled,—a statute which excluded postal agents from the class designated as passengers. The same may be said of *Price v. Pennsylvania R. Co.*, 113 U. S. 218, 18 Am. & Eng. R. Cas. 273, where the same statute was involved. Nor can it be doubted that plaintiff was entitled to a recovery of \$5,000 for the death of her husband, under the provisions of section 2 of the damage act, (Rev. St. Mo. 1889, § 4425;) *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 241, 26 Am. & Eng. R. Cas. 268; *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113. The result is that we affirm the judgment. All concur.

Injury to United States Postal Clerk on Railroad Trains.—See *ante*, *Mellor v. Missouri Pac. R. Co.*, and note, pp. 450, 456.

In *Gulf C. & S. F. R. Co. v. Wilson* (Tex. January 27, 1891), 15 S. W. Rep. 280, it is held a United States mail agent who sustains injuries while riding in a railroad car through the negligence of the railroad company, is entitled to recover damages therefor, irrespective of any question as to the company's compensation for transporting him. And where at the time of such injury the agent was riding in the proper place in his car, the fact that such car was more dangerous to ride in than other cars, in no way affects his right to recover. STAYTON, C. J., said, "Plaintiff alleged that he was a passenger; and it was proved, without objection, that he was United

States mail agent, and in the car where it was his duty to be, in charge of the mail, when the accident occurred. The car was fitted up for that purpose, and, while it was derailed, passenger-cars in the rear of it were not. We are of opinion that essentially the relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another not in its employment, whether this be by contract between them or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer, as in case of mail agents, express agents, or messengers and others having duties to their employers to perform which can be performed only by such persons traveling on railway trains or other public conveyances. Whether the public carrier of passengers receives an agreed compensation for the transportation of such persons, is compensated therefor by the charge for the car or for transportation of the property of which the person to be carried has charge, or receives no compensation whatever for the carriage of such a person, is a matter of no importance. It is enough that he is lawfully on the car, and entitled to transportation, to give to him the character of passenger, and to entitle him to recover for an injury resulting from the negligence of the carrier or its servants, if this occurs without fault on his part. If there be necessarily more danger in traveling in the coach prepared and used for transportation of the mail, even when due care is used, than in traveling in the coaches prepared and used for transportation of ordinary passengers, then it may be held that a man agent assumes the risk of danger necessarily thus arising from the position of the mail car in the train; but he does not assume any risk of danger that may result from the negligence of the carrier or its servants. The charge which sought to relieve appellant from liability because appellee was in the mail car instead of a car prepared and used for ordinary passengers was properly refused in this case, because appellee was in the mail car, the very place where appellant intended he should be, and where his duty called him. The contract by virtue of which he became entitled to transportation was made with reference to his transportation in that car, and, if appellant or its servants failed to use that degree of care prescribed by the charge of the court for his safety, then appellant was liable. This is not a case in which a passenger was injured because he placed himself uninvited in a car in which the carrier did not intend he should travel, when with safety he would have been carried in the car intended for him."

Presumption of Negligence where Person is Injured by Collision.—See note, 44 Am. & Eng. R. Cas. 353, where the authorities are collected.

In a recent Alabama case, *Georgia Pacific R. Co. v. Love* (Ala. January 8, 1891), 8 So. Rep. 714, the action was for an injury received by a passenger while riding in the caboose of a freight train. The injury was caused by the engine and the rest of the train which had been separated from the caboose, coming back against it with such force as to throw the passenger down. The court held that it should be presumed in the absence of all explanation, that the injury was caused by the company's negligence, and the company had the burden of overcoming this presumption, or showing that diligence and care could not have prevented the injury.

In *Texas Central R. Co. v. Burnett* (Tex. April 21, 1891), 16 S. W. Rep. 320, the action was brought to recover damages for injuries received by a person owing to a collision. The trial court after charging that carriers of passengers by rail are required to use the highest degree of care for their safety, and that they are liable for the negligence of their servants resulting in injury to a passenger, instructed the jury that "when it is shown by the proof that an injury was received by reason of and as the direct result of an unusual occurrence, then the law presumes the occurrence so causing the injury to have happened by reason of negligence, unless it further ap-

pears by the proof that such unusual occurrence was not the result of negligence, but, on the contrary, was caused by some circumstance or cause which the exercise of the greatest care and prudence could not have prevented." The court held that this charge was erroneous, as being an instruction upon the weight of the evidence, for it informed the jury that the law presumed negligence from the happening of any unusual occurrence producing the injury. "This" said the court, "was equivalent to instructing the jury that they would find the injuries were caused by the negligence of appellant's servants, if collisions between railway trains were unusual occurrences, and caused the injury, or any other unusual occurrence caused the injury, unless appellant brought proof to show that the accident could not have been avoided by the greatest care and prudence. The statute declares that a judge 'shall not charge or comment on the weight of evidence,' and the charge in question clearly violated it. *San Antonio & A. P. R. Co. v. Robinson*, 73 Tex. 184; *Heldt v. Webster*, 60 Tex. 208. It may be that the evidence was sufficient to sustain the verdict, but that is not the question we are now to pass upon."

SOUTHERN KANSAS R. CO.

v.

WALSH.

(45 *Kansas*, 653.)

Passenger—Derailment of Train—Presumption of Negligence.—Where a passenger brings an action to recover for injuries resulting from the derailment of the train on which he was riding, and therein shows the occurrence of the accident and the extent of his injuries, a *prima facie* case is made out in his favor, and the burden is thrown upon the railway company to show that the injury did not result from a want of care upon its part.

Same—Rebuttal—Inevitable Accident.—The *prima facie* case thus made out may be overthrown by showing that the injury resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide.

Same—Construction of Track—Degree of Care Required.—The railway company owes a higher duty to its passengers than mere ordinary care and foresight in the construction and maintenance of its tracks. It is bound to exercise the highest degree of practicable care; not the utmost possible precaution that might be imagined, but the highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted.

Evidence to Sustain Finding of Negligence—Excessive Damages for Injuries.—The testimony examined, and held to be sufficient to sustain the findings of the jury that the injury resulted from the negligence of the railway company; and the testimony in relation to the character of the injury is found to be of such a character that the allowance of \$5,246 as damages is not so excessive as to warrant the court in interfering with the verdict.

ERROR from Montgomery District Court.

Geo. R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error.

William Dunkin, for defendant in error.

JOHNSON, J.—This was an action for injuries received by L. C. Walsh while a passenger on one of the trains of the Southern Kansas Railway Company, *en route* from **Case stated.** Moline to Independence. The train was derailed

between the points mentioned, and he alleged in his petition that the track of the railroad between the points named was out of repair and dangerous for travel; that the company willfully and wantonly permitted the rails to become battered and worn, the crossties rotten and unfit for use, and negligently failed to use a proper quantity and quality of ballast on the track; and that on February 14, 1887, when the derailment occurred, the road was utterly unsafe and unfit for use. He avers that, as a result of this condition, the train was thrown from the track when running at a high rate of speed, and he was injured, as follows: "Severe wound on the left side, laying open the scalp for two inches in length, cutting through to the bone; also severe contused injury of left shoulder, and to the entire scapular region of the left shoulder, tearing the *scapula* from its muscular attachments, and tilting it forward; and also causing a separation of the first, second, and third ribs from their sternal attachment; also causing a separation of the clavicle from its sternal attachment, throwing it forward and upward, permanently dislocating the said clavicle; also a severe contusion of the left lung, causing spitting and coughing of blood; also bruises in face and over various parts of the body. A verdict was rendered in favor of Walsh, in which the jury assessed his damages at \$5,246.

It is first insisted that the evidence was insufficient to sustain the verdict rendered, or to show any liability whatever on the part of the company. It appears that on February 14, 1887, Walsh purchased a ticket at Moline for a passage from that point over the Southern Kansas Railroad to Independence, paying therefor the sum of \$1.10. The train was behind time, and when it arrived at Moline he entered one of the coaches, seated himself, and proceeded on his journey until they reached a point about two miles east of Longton, where the train was derailed. Some of the coaches were overturned, down an embankment, and Walsh was severely injured. There is testimony tending to show that the track was in bad condition where the accident occurred; that the ties were unsound, and not properly ballasted. It is shown, and conceded, that the immediate cause of the derailment was the breaking of a rail. It had been put in the track only two days before, to replace one which had been also broken at the same place. The company contends that an examination

**Evidence to
show negli-
gence in care
of track.**

of the broken place disclosed no flaws or defects which could have been detected by the exercise of the utmost caution and foresight, and that therefore the accident was fortuitous and unavoidable, for which it should not and could not be held liable. On the other side, it is contended that, although there were no apparent flaws or cracks in the rail, it was broken, because it was not sufficiently supported by ties and ballast. Upon this question there is a sharp conflict in the testimony. The sectionmen who put in the rail two days before the occurrence of the wreck testified that the rail was placed on a solid bearing; that ties were placed under the end of the rail which broke off, and that soil and ballast were tamped about the ties so as to make the track solid and secure. On the other hand, there is positive testimony offered by Walsh that the rail which broke extended about two feet over a cattleguard, the framework of which was solid, and that the end which projected beyond the cattleguard was spiked to ties, but that the ties were drawn or lifted from the ground at one end about six inches, and that the soil and ballast were not filled in and tamped under and about them. If the track was in this condition, it was dangerous and unfit for use; and this defect would fairly account for the breaking of the rail and the wreck of the train. In view of this testimony, and the finding of the jury that the sectionmen did not fill the space between the tie and the ground, but left the end of the rail with the ties attached suspended several inches from the ground, and that the ties at the place of the accident were unsound, we cannot say that the verdict is without support. The company are not insurers of their passengers, nor liable for injuries resulting from unavoidable accident in the operation of passenger trains; but there is testimony tending to show a great lack of care in providing a safe roadbed and track, and, "if the defendant could have prevented the accident by the utmost human sagacity or foresight with respect to their track, then the defendant is liable." *Union Pac. R. Co. v. Hand*, 7 Kan. 392.

It is also contended that there was error in permitting testimony to be offered by Walsh in regard to the condition of the track at other points than where the wreck occurred. Of course, testimony of defects which did not cause the derailment nor contribute to the injury was not admissible. An examination of the record indicates that the purpose of the court was to confine the testimony to the condition of the track in the immediate vicinity of the place, and near to the time where and when the train was derailed. The inquiry as to the condition of the company's track was considerably extended by

Evidence as
to condition
of track at
other points.

both parties, and in many cases without objection, for the purpose of determining the real cause of the wreck; but as the trial proceeded it soon became evident to all that the breaking of the rail caused the derailment of the cars, and the findings of the jury showed that they attributed the accident to this cause; and, looking at the testimony and findings together, we see nothing substantial in any of the objections to the admission of evidence.

Complaint is also made that the court erred in refusing to submit three special questions which were asked. No error was committed in this respect. A long list of particular questions were submitted and answered, and, so far as any facts inquired about in those refused were proper and material, they were covered by the questions that were submitted and answered. The principal question refused was: "Could any reasonable and ordinary foresight have anticipated the breaking of the iron rail after it had been left in the track by the workmen?" In the first place, the question is somewhat general, while only particular questions of fact are required to be submitted; and the question of how general or how particular the question of fact to be submitted to a jury, in any particular case, should be, rests very largely in the sound judicial discretion of the trial court. *Foster v. Turner*, 31 Kan. 62. Then, again, as we have seen, the company owes a higher duty to its passengers than mere ordinary care and foresight in the construction and maintenance of its tracks. It must use the most exact diligence, and is answerable for any negligence, however slight. It is bound to exercise the highest degree of practicable care: not the utmost possible precaution that might be imagined, but the highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted. *Union Pac. R. Co. v. Hand*, *supra*; 2 Wood, Ry. Law, 1088.

There is also complaint that the court erred in the instructions given to the jury. The charge was very elaborate, calling attention to some of the evidence, and it is claimed that in doing so the court indicated its opinion of the facts, and improperly influenced the jury. A reading of the entire charge satisfies us that the court expressed no opinion on the facts, and that the company was not prejudiced by the course taken. The trial judge simply called attention in a general way to the theories advanced by the respective parties, and the testimony offered in support of their theories, without indicating his view on any disputed point in the testimony. Besides, he repeatedly stated to the jury that he did not intend to ex-

Refusal of
special
questions.

Instructions
—Opinions on
facts.

press any opinion on the facts, and told them that they were the exclusive judges of the facts established by the evidence in the case, the credibility of the witnesses and the weight to be given to the testimony of each.

Special objection is taken to an instruction a portion of which reads as follows: "I may likewise say to you there is still another rule applicable to this case: That if you find from the evidence in this case that the plaintiff in this action was free from fault, and was injured, then the law presumes negligence on the part of the defendant." It is contended that this instruction was erroneous and misleading, and permitted the jury to find the company guilty of negligence, and liable therefor, on the mere evidence that the plaintiff was injured. It is conceded that, if the court had added to this instruction that if the jury found that Walsh was a passenger on the train of the company, and was injured on account of a defect in the track or some of the appliances of the road or its machinery, then the presumption of negligence would arise; but, as injuries frequently happen without any fault or misconduct on the part of the company or its employes, that, therefore, the instruction was erroneous and prejudicial. The instruction complained of is not to be taken by itself, and without reference to the other portions of the charge in which it is found. The court expressly stated to the jury that the burden rested on the plaintiff to show that the injury resulted from the negligence of the company, and that negligence could not be presumed. The part of the charge criticised referred to the presumption which arises where a collision between railway trains occurs, or where a train is derailed and passengers thereon are injured. It is well settled by the authorities that in such cases a *prima facie* presumption of negligence on the part of the railroad company arises, which throws the *onus* upon the company of disproving a want of care on its part. Proof of the occurrence of the accident, and the extent of the passenger's injury makes a *prima facie* case in his favor; but this may be overthrown by showing that the injury resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide. *Breen v. New York Cent. & H. R. R. Co.*, 109 N. Y. 297, 34 Am. & Eng. R. Cas. 523; *Delaware, L. & W. R. Co. v. Napheys*, 90 Pa. St. 135, 1 Am. & Eng. R. Cas. 52; *Stokes v. Saltonstall*, 13 Pet. (U. S.), 190; *New Jersey R. & Transp. Co. v. Pollard*, 22 Wall. (U. S.), 341; *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 16 Am. & Eng. R. Cas. 310; *Philadelphia & R. Co. v. Anderson*, 94 Pa. St. 351, 6 Am. & Eng. R. Cas. 407; *Hipsley v. Kansas City, St. J. & C. B. R.*

Co., 88 Mo. 348, 27 Am. & Eng. R. Cas. 287; Cleveland, C. C. & I. R. Co. v. Walrath, 38 Ohio St. 461, 8 Am. & Eng. R. Cas. 371; Bowen v. New York Cent. R. Co., 18 N. Y. 408; Feital v. Middlesex R. Co., 109 Mass. 308; Railway Co. v. Findley, 76 Ga. 311; 2 Wood, Ry. Law, 1096; Patt. Ry. Acc. Law, 438, and cases cited. The instruction complained of should have required a finding by the jury that the injury resulted from the derailment; but this fact was not disputed, and, as the derailment is conceded to have been caused by a broken rail in the track of the company, the omission is unimportant. In other portions of the charge the jury are advised that, if the derailment was an inevitable accident, and not the fault of the company, the law will hold it blameless and free from liability. The degree of care required of the company and of Walsh, and the rules of law applicable to the case under the evidence that was given, were fairly stated and we find nothing in the charge which requires a reversal.

One other objection remains, and that is that the damages awarded are excessive. Only compensatory damages were allowed, and the amount of the allowance (\$5,246)

**Excessive
damages.**

was itemized by the jury as follows: "For suffering in the past, \$1,000; for suffering in the future \$1,000; for inability to perform physical labor, \$3,000; for physician's bills, \$150; for board and lodging, \$42; for loss of time, 18 days, at \$3 per day, \$54. While it appears to us that the amount awarded is liberal, we cannot say that the jury acted corruptly or under the influence of passion, partiality, or prejudice. At the time of the accident, Walsh was 31 years of age, in excellent health, and held the position of United States pension examiner, the compensation of which was about \$2,500 per year. Dr. McCulley, who examined him shortly after the injury occurred, found a wound on the back of his head two inches in length, and half an inch deep; a fracture of the clavicle bone, near the middle breast bone; a complete fracture of the first, second, and third ribs; the *scapula* was thrown out of its natural position, and one of the large muscles which held the *scapula* was torn from its attachment; the *pleura* which surrounds one of the lungs was ruptured; and he also found a continual coughing, and an occasional coughing up of blood. On a subsequent examination, shortly before the trial, the same witness stated that he found a vesicular condition of the lungs, and inability to expire air, and that it was his opinion that his ability for labor was greatly impaired, and perhaps to the extent of one-half; that the effect of his injury would be to render him liable to attacks of asthma and diseases of the lungs, and to shorten his life. Dr. Masterson, one of the surgeons of the railway company, ex-

amined Walsh shortly after his injury, and discovered the same fractures and injuries that were found by Dr. McCulley. He also found that there was an emphysematous condition of the lungs, and that the upper lobe of the left lung was injured. There was also a cough, and bloody expectoration. That, on account of a rupture of the lung tissue, the air escaped and passed through the *pleura* of the lung into the cellular tissues. On another examination, shortly before the trial, he found that there was a dilation of the air vessels, and enlarged condition of the terminal ends of the bronchial tubes, and that, in his opinion, Walsh would never fully recover from the effects of the injuries. Another physician who examined him stated that the effect of the injury would be to weaken his lungs, shorten his life, and occasion him pain and suffering. Walsh testified that he had suffered great pain from the injuries until the wounds were healed and the bones united; that the injuries had greatly affected his general health; that he had continuous pain in the region of his kidneys, a bloody discharge with his urine, a continuous cough, with pain in the lungs; that his powers of endurance were greatly lessened, and his ability to perform manual or mental labor was not more than one-half of what it was prior to the injury. The testimony shows that the injury, which has already caused Walsh great pain and suffering, is of a permanent character, that it greatly impairs his ability for labor, will subject him to discomfort and pain during the future, and render him less able to resist or recover from other diseases hereafter. In view of the age, former good health, and earning capacity of Walsh, and his condition as shown by the testimony referred to, we do not feel warranted in interfering with the verdict upon the ground that the award of damages is excessive. The judgment of the district court will be affirmed. All the justices concurring.

Excessive Damages for Personal Injury.—See note, 46 Am. & Eng. R. Cas. 667.

Injury to Passengers—Presumption of Negligence in Case of Derailment.—See note, 44 Am. & Eng. R. Cas. 351.

In *Montgomery E. R. Co. v. Mallette* (Ala. May 5, 1891), 9 So. Rep. 366, it is held that evidence that a passenger was injured by the derailment of a car, entitles him to recover, unless the railroad company reasonably satisfies the jury that the derailment was not due to negligence, and could not have been prevented by the exercise of the highest degree of care, skill and diligence on the part of the carrier. If the evidence as to negligence aside from the derailment is equally balanced, the plaintiff should recover. The court said: "The authorities present equal unanimity to the proposition that where a passenger receives injuries from the breaking down of the carrier's vehicle, from the derailment of a car, from collisions or the like,—occurrences which ordinarily would not take place but for some negligence on the part of the carrier,—the *prima facie* presump-

tion is that the injury was the result of the carrier's negligence; and in an action therefor, the plaintiff having shown that he was a passenger, and that he was injured by the derailment, for instance, of the car in which he was being transported, he is, upon this and without more, entitled to recover the damages thereby sustained, unless the defendant, in rebuttal of this *prima facie* presumption, reasonably satisfies the jury that the derailment was not due to any negligence, and could not have been prevented by the exercise of the highest degree of care, skill, and diligence on the part of the carrier. Authorities *supra*; Thomp. Carr. 181 *et seq.*; 2 Wood. Ry. Law, 1096; 2 Am. & Eng. Ency. Law, 768 *et seq.*; Railroad Co. v. Wightman, 29 Gratt. (Va.) 431; Central R. Co. v. Sander, 73 Ga. 513, 27 Am. & Eng. R. Cas. 300; New York, L. E. & W. R. Co. v. Seybolt, 95 N. Y. 562, 18 Am. & Eng. R. Cas. 162; Hipsley v. Kansas City, St. J. & C. B. R. Co., 88 Mo. 348, 27 Am. & Eng. R. Cas. 287, and note; Baltimore & Y. Turnpike R. Co. v. Leonhardt, 66 Md. 70, 37 Am. and Eng. Corp. Cas. 194; Eureka Springs R. Co. v. Timmons, 51 Ark. 459, 40 Am. & Eng. R. Cas. 698 and notes; Stokes v. Saltonstall, 13 Pet. (U. S.), 181; New Jersey R. & Transp. Co. v. Pollard, 22 Wall. (U. S.), 341. The cases of Georgia Pac. R. Co. v. Hughes, 87 Ala. 610, 39 Am. & Eng. R. Cas. 674, and Louisville & N. R. Co. v. Reese, 85 Ala. 497, 38 Am. & Eng. R. Cas. 342, to which our attention has been invited in this connection, are not in point. The parties injured, and who were plaintiffs in those actions, were not passengers of the defendant companies, and the principles we have been considering had no application in either of them. The trial court correctly stated the law as to what facts made out a *prima facie* case for the plaintiff, entitling him to recover, and as to the measure of proof necessary to overturn the presumption of negligence growing out of and resting upon the facts adduced in the first instance by the plaintiff."

Degree of Care Required in the Carrying of Passengers—Instructions.—In *Montgomery E. R. Co. v. Mallette* (Ala. May 5, 1891,) 9 So. Rep. 366, which was an action for personal injuries received by the plaintiff while a passenger upon defendant's railroad train, it was held that there was no error in a charge to the jury that "the law requires the highest degree of diligence, and care, and skill, by those engaged in the carriage of passengers of railroads, known to be careful, diligent and skillful persons engaged in such business."

ALABAMA GREAT SOUTHERN R. CO.

v.

HILL.

(Alabama Supreme Court, January 24, 1891.)

Personal Injuries—Physical Examination of Plaintiff—Discretion of Court.—While the defendant in an action for personal injuries, is entitled to have a physical examination of the plaintiff's person by experts, the selection of such experts is a matter entirely within the discretion of the trial judge. The refusal of the judge to appoint a particular physician at the instance of the defendant, is not a matter which the supreme court will review,

Same—Evidence as to Previous Health or Subsequent Injuries.—A woman suing for injuries sustained by her while a passenger upon defendant's train, may prove that her health was good up to the time of the accident; that her physical organs discharged their functions naturally and regularly, which was not the case after the accident; the manner in which she was tossed about and jolted by the accident; that after the accident she

could hardly get up, suffered great pain, and could not walk any distance or sleep without medicine.

Same—Effect of Negligence of Physician Attending Plaintiff.—The fact that the physician who attended plaintiff after the accident, omitted to call in a surgeon to perform an operation which would greatly benefit the plaintiff, but to which he did not deem himself equal, has no bearing on plaintiff's right of recovery, nor does it tend to lessen or increase her damages, nor affect the credibility or value of the testimony of such physician as an expert.

Derailment of Car—Evidence as to the Condition of Track Near Place of Accident.—The injury to the plaintiff was caused by the derailment of the car in which she was riding, and the evidence tended to show that the cause of such derailment was the breaking of a rail, and that the rail gave way in consequence of the defective condition of the ties. *Held*, that it was not error to allow plaintiff to adduce evidence going to show that other rails and cross ties in that vicinity were also old, worn and decayed.

Statement of Witnesses as to Condition of Cross Ties—Best Recollection.—The court properly received the testimony of a witness that "to the best of my judgment what we called in the 'short quarter,' where the rail was broken, was on a rotten cross tie, but I won't be positive."

Medical Expert—Extent of Practice.—In an action for personal injuries, it is proper for the court to disallow as leading the following question. "You have had many cases of obstetrics, have you?"

Care Required of Carriers of Passengers—Instruction—"Strict Diligence."—In an action for an injury to a passenger, it is not error for the court to instruct the jury that the law requires "strict diligence" on the part of carriers of passengers.

Derailment of Car—Presumption of Negligence.—Where a passenger upon a railroad train is injured owing to the derailment of the car in which he is travelling, a presumption of negligence on the part of the carrier arises from proof of such accident.

General Charge Ex Mero Motu—How to be Considered.—Where a trial judge gives a general charge *ex mero motu*, it must be considered as a whole. Each declaration being interpreted in the light of its context, and if, when so considered, it asserts the law clearly, it is no ground for reversal that a particular clause of such general charge considered alone is defective.

Argument of Counsel—Improper Remarks.—A party can have no just ground of complaint on account of remarks of counsel in addressing the jury, improper in themselves, which have been necessitated by like remarks on the other side.

Action for Injury to Passenger—Count in Complaint—Evidence to Support—Instructions.—In an action by a passenger for injuries caused by the derailment of a car, the complaint alleged that the defendant was negligent in running its train at too great speed, and also in maintaining a defective track. There was no evidence of negligence as to the speed of the train. *Held*, that it was proper for the court to refuse a charge to find for defendant on such count.

Injury Caused by Defective Track—Gross Negligence—Exemplary Damages.—In an action by a passenger to recover damages for an injury caused by a derailment, evidence that the cross ties near the place of the accident were unsound, decayed and rotten, and that the rails were old and defective, and that they were from time to time replaced by other old rails, warrants the finding of such gross negligence on the part of the defendant as will authorize an award of exemplary damages.

Same—Same.—An instruction which limits the authority to impose exemplary damages on a carrier of passengers, for injuries sustained by reason of the derailment of a car, to cases in which there is an "entire want

of care," on the part of defendant in the maintenance of its track, is properly refused.

Instructions to Jury—Singling out Testimony.—A court is under no obligation to single out the testimony of one or more witnesses, and instruct the jury to reach certain conclusions if such testimony be believed.

Same—Doubt and Uncertainty as to Facts.—The court properly refused an instruction to find against the plaintiff provided the jury were "in doubt and uncertainty" as to certain facts essential to her case.

APPEAL from City Court of Birmingham.

Action by Nollie C. Hill, by next friend, against the Alabama Great Southern Railroad Company, for personal injuries sustained by plaintiff, caused by derailment of a car on which she was a passenger. Judgment for plaintiff, and defendant appeals. For report on former appeal, see 90 Ala. 71, 44 Am. & Eng. R. Cas. 441.

Wood & Wood, for appellant.

E. T. Taliaferro and *Noble Smithson*, for appellee.

MCCLELLAN, J.—1. It was determined on the former appeal in this cause that the defendant was entitled to have a physical examination of the plaintiff's person made by disinterested and competent experts to be appointed by the court. The selection of such experts is a matter entirely within the discretion of the trial judge. Neither party has any right, by suggestion, motion or otherwise, to control his discretion in any degree. The court, in making the order for a physical examination, and in designating the experts to execute it, is conserving the interest of neither the defendant nor the plaintiff, but the ends of justice; and when a competent and impartial commission is named, it is a matter of no consequence whatever that the parties, or either of them, preferred and demanded the appointment of other persons. There is no suggestion here that the physicians selected were not in all respects qualified to discharge the duty imposed upon them by the order of the court; and the court's declination to appoint Dr. Battey, at the instance of the defendant, is not a matter which this court will review. Moreover, were this action revisable, we are by no means prepared to say that the fact that Dr. Battey had already formed and expressed an opinion relative to the existence of the injuries laid in the complaint was not ample justification for the court's refusal to appoint him on the commission.

2. Motions to postpone a trial to a later day of the term stand upon the same footing as applications for continuances from term to term, and both are addressed to the unrevisable discretion of the court. *De Arman v. State*, 77 Ala. 10; *Walker v. State*, (Ala.), 9 South. Rep. 87; 3 Brick. Dig. pp. 404, 405.

3. This cause was tried in October, 1890, before the passage of the act allowing appeals to this court from "decisions of the city and circuit courts in this state granting or refusing to grant motions for new trials," (Acts 1890-91, p. 779;) and the action of the city court, in denial of the application for a new trial, made by the defendant, cannot be reviewed. *Trammell v. Vane*, 62 Ala. 301; *Tyree v. Parham*, 66 Ala. 424; *Bedwell v. Bedwell*, 77 Ala. 587; *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 44 Am. & Eng. R. Cas 441.

Appeal to
Supreme
Court.

4. Damages are claimed in this action for that the plaintiff, a passenger on defendant's train, received, from the derailment of the car in which she was being transported, injuries which produced present and continuing pain and mental anxiety, immediate physical hurts, which are permanent in their character and are alleged to have seriously impaired her health, and threatened her life. Whether she was injured at all was a point of much controversy in the case. Similarly, each detail and specification of injury was made the subject of severe contestation on the trial. Whether the injuries, if any, were painful, and in what degree; whether she was shocked and prostrated; whether she was subsequently in bad health as a resultant of the injuries she received; whether, and to what extent, her physical condition after the accident was abnormally bad,—were, with other like inquiries, injected into the case by the pleadings, and prosecuted before the jury. We cannot for a moment be in doubt that, as pertinent to these issues, it was entirely competent for the plaintiff to prove that she had always enjoyed good health before and up to the time of the derailment; that her physical organs had theretofore discharged their functions naturally and regularly; the manner in which she was jolted, tossed, and thrown about as the car ran for some distance on the cross-ties, and finally turned over an embankment; that immediately afterwards she "could hardly get up," and was "suffering great pain;" that afterwards she "could never sleep, unless she had some medicine to quiet her;" and that she "had not undertaken since the accident to walk any great distance, and could not walk any great distance;" that "her menstruations had been irregular ever since she was hurt," etc. All this evidence was, in our opinion, clearly admissible as tending to show the fact and extent and character of the injuries which she had sustained. *Bay Shore R. Co. v. Harris*, 67 Ala. 6; *East Tenn., V. & G. R. Co. v. Lockhart*, 79 Ala. 315; *South & North Ala. R. Co. v. McLendon*, 63 Ala. 266; 2 *Thomp. Neg.* 1256, 1257.

Evidence as
to plaintiff's
injuries.

5. The reasons which actuated Dr. Drennen in his omission

“to call in some surgeon and remove” the coccyx bone could not, of course, have any bearing upon plaintiff’s right of recovery, nor tend to lessen or increase her damages. Nor do we conceive that such reasons could have affected the credibility or value of his testimony as an expert. He testified that the condition of this bone was the cause of much pain to the plaintiff, and that this condition could be cured by its removal by a surgical operation, to which he did not deem himself equal. Add to these facts the concession of what is assumed in the question, that he did not call on a surgeon, etc., and it would seem that, standing alone, they involve a greater tendency to impeach his competency as an expert than any explanation of his failure to take steps for the operation would have done. We cannot assume that the reasons called for by the question would have been of such character as to impugn the intelligence and professional attainments of the witness. Moreover, we know of no basis for a distinction between witnesses of this and other classes, which would take these, when speaking to matters of this kind, out of the general rule against drawing out the reasons which conduced to an act or omission to which they depose. *Herring v. Skaggs*, 62 Ala. 180.

6. The objection to the testimony of Dr. Drennen, to the effect that plaintiff’s injuries were of such character as that child-bearing would be thereby rendered perilous to life, is untenable. It may be that she might never have married, even had she not been injured, or that, marrying, she might have had no desire to bear children, or even that, desiring issue, she might not have had any, as is argued by counsel; but these considerations can exert no influence on the question. It is to be assumed that every physical endowment, function, and capacity is of importance in the life of every man and woman and that occasion will arise for the exercise of each and all of them; and to that extent to which any function is destroyed or its discharge rendered painful or perilous by the wrongful infliction of personal injury, is the party complaining entitled to damages. We can, in other words, conceive of no physical injury wrongfully inflicted, whether entailing pain only or disfigurement or incapacity, relative or absolute, to perform any of the functions of life, which may not be made the predicate for compensation in damages. *Mayor, etc., v. Lewis*, (Ala.), 9 So. Rep. 243.

7. The evidence tended to show that the immediate cause of the derailment from which the injury complained of resulted, was the breaking of a rail as the coach on which the

plaintiff was riding passed over it, and also that the rail gave way in consequence in part of the defective condition of the cross ties under it, and in part of the rail itself being old and worn. Plaintiff was allowed, against defendant's objection, to adduce evidence going to show that other rails and cross ties along there were also old, worn, rotten, decayed, etc. There was no error in this. It may well have been that other defective rails and cross ties in the immediate vicinity contributed to the breaking of the particular rail by imparting an irregular motion to the cars, and causing them to bear down with greater weight and force at the point where the track gave way. Moreover, all this evidence was competent as affording a stronger inference that defendant's employes knew of the perilous condition of the track, including that portion constituted of the broken rail and the ties beneath it, than would have been afforded by proof confined to the particular rail and ties. *Railroad Co. v. Johnson*, 15 Lea (Tenn.), 677.

Evidence as to condition of rails and ties.

8. The testimony of the witness Curley that "to the best of my judgment what we called in the 'short quarter,' where the rail was broken out, was on a rotten cross tie but I won't be positive," was but the statement of his best recollection about a fact, (that the rail broke on a rotten tie,) as to which he would not speak positively, and was properly received. *Head v. Shaver*, 9 Ala. 791; *Wright v. Bolling*, 27 Ala. 259; *Elliott v. Dyche*, 80 Ala. 376.

9. The action of the court in disallowing the question propounded by the defendant to its witness Dr. Gaston, "You have had many cases of obstetrics, have you?" may be justified upon the leading character of the question.

10. The law imposes upon common carriers the duty of exercising the highest degree of care, skill, and diligence in the transportation of passengers, and holds them responsible for the consequences of the slightest negligence resulting in injury to persons sustaining that relation to them. The first paragraph of the general charge to which exception was taken, which implies that the law requires "strict diligence" of such carriers is well within this principle. *Searle's Adm'r v. Kanawha & O. R. Co.*, 32 W. Va. 370, 37 Am. & Eng. R. Cas. 179; *Louisville, N. A. & C. R. Co. v. Snider*, 117 Ind. 435, 37 Am. & Eng. R. Cas. 137; notes to *Irelson v. Southern Pac. R. Co. (La.)*, 44 Am. & Eng. R. Cas. 319; *Louisville & N. R. Co. v. Ritter*, 85 Ky. 368, 28 Am. & Eng. R. Cas. 167; *New York, L. E. & W. R. Co. v. Daugherty (Pa.)*, 6 Am. & Eng. R. Cas. 139; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. St. 351, 6 Am. & Eng. R. Cas. 407; *Bedford, S. O. & B. R. Co. v. Rainbolt*, 99

Degree of care required of carriers.

Ind. 551, 21 Am. & Eng. R. Cas. 466; Topeka City R. Co. v. Higgs, 38 Kan. 375, 34 Am. & Eng. R. Cas. 529; Smith v. St. Paul City R. Co. 32 Minn. 1, 16 Am. & Eng. R. Cas. 310; Dodge v. Boston & B. Steam Ship Co., 148 Mass. 207, 37 Am. & Eng. R. Cas. 67; Treadwell v. Whittier, 80 Cal. 575; Hutch. Car. §§ 503, 799-801; Thomp. Car. 175 *et seq.*; 2 Am. & Eng. Ency. Law, p. 745; 2 Wood, Ry. Law, p. 1095; Louisville & N. R. Co. v. Jones, 83 Ala. 376, 34 Am. & Eng. R. Cas. 417; Georgia Pac. R. Co. v. Love (Ala.), 8 South. Rep. 714; Montgomery & E. R. Co. v. Mallette (Ala.), 9 South. Rep. 363. This high degree of care is imposed by the law as being reasonable in view of the relation existing between the carrier and his passenger; and it is in this sense that the term "reasonable care" must be taken to have been employed in Smith v. Georgia Pac. R. Co., 88 Ala. 540, 41 Am. & Eng. R. Cas. 143.

11. In Mallette's Case, *supra*, we had occasion, immediately following the proposition just stated, and after citing the authorities there referred to, to announce the doctrine that under certain circumstances a presumption of negligence on the part of the carrier arises from proof of an accident and consequent injury to a passenger. We there said: "The authorities present equal unanimity to the proposition that where a passenger receives injuries from the breaking down of the carrier's vehicle, from the derailment of a car from collisions, and the like occurrences, which would not ordinarily take place but for some negligence on the part of the carrier, the *prima facie* presumption is that the injury is the result of the carrier's negligence; and in an action therefor the plaintiff, having shown that he was a passenger, and that he was injured by the derailment, for instance, of the car in which he was being transported, he is, upon this, and without more, entitled to recover the damages thereby sustained, unless the defendant, in rebuttal of this *prima facie* presumption, reasonably satisfies the jury that the derailment was not due to any negligence, and could not have been prevented by the exercise of the highest degree of care, skill, and diligence on the part of the carrier." Authorities *supra*; Thomp. Car. 181 *et seq.*; 2 Wood, Ry. Law, 1096, 2 Am. & Eng. Ency. Law, p. 768, *et seq.*; Railroad Co. v. Wightman, 29 Gratt. (Va.), 431; Central R. Co. v. Sanders, 73 Ga. 513, 27 Am. & Eng. R. Cas. 300; Hipsley v. Kansas City, St. J. & C. B. R. Co., 88 Mo. 348, 27 Am. & Eng. R. Cas. 287, and note; Baltimore & Y. Turnpike R. Co. v. Leonhardt, 66 Md. 70, 27 Am. & Eng. R. Cas. 194; Eureka Springs R. Co. v. Timmons, 51 Ark. 459, 40 Am. & Eng. R. Cas. 698, and note; Stokes v. Saltonstall,

Presumption
of negligence
from proof of
accident.

13 Pet. (U. S.), 181; New Jersey R. & Transp. Co. v. Pollard, 22 Wall. (U. S.), 341; Louisville & N. R. Co. v. Jones, 83 Ala. 376, 34 Am. & Eng. R. Cas. 417; Georgia Pac. R. Co. v. Love (Ala.), 8 South. Rep. 714. The cases of Georgia Pac. R. Co. v. Hughes, 87 Ala. 610, 39 Am. & Eng. R. Cas. 674; and Louisville & N. R. Co. v. Reese, 85 Ala. 497, 38 Am. & Eng. R. Cas. 342, to which our attention has been invited in this connection, are not in point. The parties injured, and who were plaintiffs in those actions, were not passengers of the defendant companies; and the principles we have been considering had no application in either of them. Railway Co. v. Mallette, *supra*. The evidence in this record brings the present case strictly within this principle. The plaintiff was a passenger, being transported on a car of the defendant. The car was derailed; and she received the injuries of which she complains as a result of that derailment. The numerous authorities cited fully meet and overturn the position of counsel attempted to be based on the case of Georgia Pac. R. Co. v. Hughes, *supra*, and determine the exceptions reserved in this regard against the appellant.

12. Quite a number of medical and surgical experts were examined in this cause. The testimony of most of them consisted both of facts involved in the physical condition of the plaintiff subsequent to the accident and of opinions as to the causes of that condition, the consequences to flow from it, the feasibility and means of relief or amelioration of it, etc. Those paragraphs of the court's general charge with respect to the testimony of these experts to which exceptions were reserved had reference solely to this opinion evidence, and not to any fact testified to by them. The court instructed the jury that "the opinion of expert witnesses should not be substituted for such opinion as the jury may form from the whole facts and whole evidence in this case, and this opinion should be weighed along with all the other facts in the cause;" and that "in no case should the jury accept the opinion of an expert as true, unless it agrees with the conclusions as based upon the whole facts of the case; and such opinion should be considered in connection with all the other facts in making up the conclusion of the jury upon each fact it bears upon." These paragraphs of the general charge, relating to the same matter, must be construed together. It is the settled doctrine of this court "that the general charge given *ex mero motu* in the court below should be read and construed with regard to the connection between its several sentences and propositions, each declaration being shaded and interpreted in the light of its context; and, if any part, when so considered, lim-

Instructions
—Charge *ex mero motu*.

ited, or expanded, asserts the law correctly, it will not furnish ground for reversal, however faulty the particular clause might be, if its meaning was not controlled by prior or subsequent passages." *Montgomery & E. R. Co. v. Stewart*, 91 Ala.—, 8 South. Rep. 708; *Williams v. State*, 83 Ala. 68; *O'Donnell v. Rodiger*, 76 Ala. 222. Looking at each of these paragraphs in the light shed upon it by the other, and limiting and expanding the several propositions of each by the context of both,—or, in other words, arriving at the meaning the trial court intended to convey from all that was said on the subject, as the jury must have done—we evolve out of these paragraphs no more than this proposition; that, if the jury reach a given conclusion from a consideration of the whole evidence, including as well the opinions of the experts as substantive facts deposed to by witnesses, whether experts or non-experts, they are not to surrender this conclusion, which is their opinion upon the whole evidence, because the opinions of the experts do not coincide with theirs, but leads to a different result; or, to express the same thought in variant phraseology, the jury are not to substitute for their own views of what is established by the whole evidence, substantive and opinion, expert and non-expert, the opinion of expert witnesses, for to thus surrender their own conclusions, and substitute instead the conclusions of witnesses as to what was proved by the evidence, would be to make such witnesses, and not the jury at all, the triers of the cause. We do not think that either of the paragraphs excepted to is an instruction on the weight to be accorded the opinion evidence. To the contrary, each and both of them leave that question entirely an open one for the jury, and only confine such opinions to the legitimate office of all evidence—that of being considered with every other fact and circumstance laid before the jury in arriving at their conception of the truth; thus guarding them against the error of allowing the expert opinion to be substituted for their own judgment. The exceptions reserved in this connection are untenable. *Rog. Exp. Test.* § 37 *et seq.*; *Lawson, Exp. Ev.* p. 240; *Brehm v. Great Western R. Co.*, 34 Barb., N. Y., 256; note to *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 230.

13. That part of the closing argument of plaintiff's counsel to the court's rulings, in respect of which exceptions were reserved, appears to have been in reply to the argument of defendant's counsel, and to have been of the same general character. The opening sentences of the language complained of are: "I never did in my life, and I challenge the gentleman to name a lawsuit in which I have been engaged since I have been practicing law in the city of

Argument of
counsel.

Birmingham where I have done it, [abused men who are employes of railroads.] On the contrary, gentlemen, if I may be allowed to speak my sentiments as he [counsel for defendant] has been allowed to speak his, my sympathies are always with the employes of a railroad," etc. The fair inference from this language which went unchallenged, so far as the fact of its being responsive to defendant's counsel is concerned, is that if what followed was outside of the case, so also was the language of the opposing counsel in the same connection; and the refusal of the trial court to exclude the remarks objected to from the jury may well be justified on that ground alone. A party can have no just ground of complaint on account of remarks, improper in themselves, which have been necessitated by like remarks on the other side.

14. Charges 1, 2, and 3, requested by the defendant, and refused, being the general charge on the whole case, and upon the first and second counts, respectively, are not insisted on. Their refusal was palpably proper. Charge No. 4 of defendant's series is as follows: "If the jury believe the evidence in this cause, they must find their verdict for the defendant under the third count of the complaint." It is strenuously insisted that this charge should have been given. The argument in its support proceeds on the theory that this count charges negligence only in the running of the train at great speed, and that there is no evidence in the case tending to show negligence in the manner in which the train was run (moved) at the time and place of the accident, or that it was being run at great speed. This theory is not supported as to either of its postulates. The third count of the complaint not only alleges the negligent running of the train at a "rapid rate of speed," and that the rails at the point of derailment were old iron rails, worn, unsound, insecure, and unfit for use, and that the crossties on which said rails were laid were unsound, rotten, and insecure; but also "that said accident was caused by the gross negligence of said defendant in running its train at such a rate of speed over said rails, and [in addition to all this, and wholly irrespective of the running of the train, or the manner and rate of such running] by the gross negligence of said defendant in using and permitting to be used said old and worn iron rails and rotten and unsound crossties after they had become unfit for use on said road." Had the burden, beyond proof of derailment and consequent injury to a passenger, been on plaintiff to show negligence on the part of the defendant, she would have been entitled to recover on this count on proof that the derailment was caused by the defective condition of the track, and without any evidence

Speed of train
—Negligence
—Evidence—
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of negligence in respect of the running of the train. *Railroad Co. v. Jones*, 83 Ala. 376, 3 South. Rep. 902. The other assumption involved in appellant's position in reference to this charge (No. 4) is equally without support. The fact that the train ran 300 yards with some of the cars off the rails and on the ties, and when presumably every effort was being made to stop it, is itself some evidence that a high rate of speed, amounting to negligence, especially when considered in connection with the condition of the track, was being maintained.

15. Charges 5, 6, 7, 8, 35, and 36 proceeded on the assumption that the only injuries alleged in the case or in the several counts consisted in displacement of plaintiff's womb, and in an injury to the last *vertebra* of her spinal column. The assumption is gratuitous, as a reading of the complaint will demonstrate. These charges were well refused.

16. The matter of exemplary damages was before this court—as were many other points now again presented—on the former appeal. We then said: “We discover
Exemplary damages. no error in the rulings of the trial court on the question of punitive damages. There was evidence in the case tending to show that the cross-ties or a considerable portion of them under the track at the point of the derailment of the car in which plaintiff was riding,—the wreck being the result of a broken rail,—were ‘unsound’, ‘decayed’, ‘rotten’; that the rail which broke was an ‘old rail,’ as were others along there; and that the defendant company was ‘constantly repairing that old track with old rails.’ With the weight or sufficiency of this evidence we have nothing to do. Whether or not its tendencies were entirely rebutted by other testimony is also beyond our inquiry. Those were questions for the jury. We are satisfied that it tended to show a condition of the track, not to know and remedy which was such gross negligence on the part of the company as implied recklessness and wantonness, such indifference to the probable consequences of its continued use, such disregard of the safety of passengers being transported over it, as is the equivalent of intentional wrong, or a willingness to inflict the injuries complained of. And if the jury found the facts to be in accordance with this tendency of the testimony, they were authorized to return a verdict for exemplary damages.” The evidence in this record is substantially the same on this subject as that adduced on the former trial. The conclusion then reached we now reaffirm. What was then said, however, is open to criticism in that it authorized the conclusion that recklessness or wantonness could be predicated of the mere omission of a duty to

know the condition of the track which the evidence tended to establish. That this was an inaccurate statement of the doctrine was attempted to be demonstrated by the present writer in the subsequent case of *Georgia Pac. R. Co. v. Lee*, (Ala.) 9 South Rep. 230, and the inaccuracy was specifically pointed out in the yet later case of *Richmond & D. R. Co. v. Vance* (Ala.), 9 South Rep. 574. That statement, however, was an abstraction. No result depended upon it there, and none depends on it here. As was reiterated in the case last cited, the condition of the rails and cross-ties, and the fact of old rails being used constantly to repair that old track, was sufficient to authorize an inference on the part of the jury that the defendant knew of this condition of things, and to impute to them such recklessness or wantonness as is the equivalent of conscious wrong doing in continuing to run trains over a track in such dangerous condition. So finding, the jury were further authorized to impose punitive damages. It follows that the several charges requested by the defendant below on the assumption or to the effect that there was no evidence in the case of recklessness or wantonness were properly refused. *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 44 Am. & Eng. R. Cas. 441; *Georgia Pac. R. Co. v. Lee*, (Ala.) 9 South. Rep. 230; *Richmond & D. R. Co. v. Vance*, *Id.* 574.

17. Charge No. 20, requested in this connection, is bad, in that its tendency is to limit the imposition of vindictive damages to cases in which there is an "entire want of care" on the part of the defendant in respect of maintenance of its track, if not also in postulating facts of some of which there is no evidence. Some degree of care may have been exercised in the maintenance of the track, and yet it have been consciously left in such condition as that to run trains over it would probably have resulted in disasters of the kind alleged here.

18. The court is under no obligation to single out the testimony of one or more witnesses, and instruct the jury to reach certain conclusions if such testimony be believed. To do so has the tendency to give undue prominence to the evidence of the witnesses thus separately set before the jury, and to obscure and minimize other evidence bearing on the point. Such would have been the tendency of charge 21, requested by the defendant, with respect to the testimony of Drs. Gaston and Johnson; and its refusal may be justified on that ground. *Salm v. State*, 89 Ala. 56; *Kennedy v. State*, 85 Ala. 327; *Fariss v. State*, 85 Ala. 1.

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testimony.

19. In *Calhoun v. Hannan*, 87 Ala. 277, this court said: "The burden being on the plaintiff to show falsity of the affi-

davit in respect to the ground alleged for the issuance of the attachment, he must reasonably satisfy the minds of the jury in this regard. Manifestly, if their minds are left in a state of confusion and uncertainty on this point, the plaintiff has failed to make out this very essential part of his case, and cannot recover." This case is relied on to support the exceptions reserved to the action of the trial court in refusing to give charges which asserted that if the jury were in doubt and uncertainty as to certain facts essential to plaintiff's case, they should find against her. The case is not authority to the point. The mind may be reasonably satisfied of a given fact, and yet not be certain of it, nor free from doubt in respect of it; but no mind can be said to be reasonably satisfied as to the existence of a particular fact which is in a state of confusion—the synonym, when applied to mental processes and conditions, of bewilderment and distraction—in respect thereto. These charges would have required a greater measure of proof than is necessary even in criminal cases, in that the conviction on the part of the jury would have had to be to the exclusion of doubt and uncertainty, whether reasonable or not. *Harris v. Russell*, (Ala.) 9 South. Rep. 541.

20. A number of other charges were requested by the defendant and refused. They have all received careful consideration. We shall not, however, further extend this opinion by a discussion of them in detail. Each of them will be found to be either unsound in the abstract, or argumentative, or misleading, or invasive of the province of the jury, or to assume the existence of evidence not found, or the non-existence of evidence which is found, in this record; and many of them are open to more than one of these objections. Similarly we premit discussion of three or four rulings on the evidence, because the objections to them are obviously lacking in merit. Every point made in the case has been considered (a great number of them, indeed, were passed on when the case was here before,) and all plausible exceptions have been written upon. We find no error in any ruling of the trial court, and the judgment is affirmed.

Action for Personal Injuries—Physical Examination of Plaintiff.—See *Union Pacific R. Co. v. Botsford*, *ante* p. 406, note p. 414.

Injury to Passenger Owing to Derailment—Presumption of Negligence.—See note, 44 Am. & Eng. R. Cas. 351.

Exemplary Damages for Injuries to Passenger Caused by Defective Track.—See *International G. N. R. Co. v. Brazzil* (Tex.), 44 Am. & Eng. R. Cas. 437; *Missouri Pac. R. Co. v. Shuford* (Tex.), 37 Am. & Eng. R. Cas. 194; *Ala. G. S. R. Co. v. Hill*, (Ala.) 44 Am. & Eng. R. Cas. 441.

In *Richmond & D. R. Co. v. Vance* (Ala. June 24, 1891,) 9 So. Rep. 574, it was held that the fact that the track where the accident occurred was

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theretofore defective and that defendant's officers and servants might have known it, does not render defendant liable for punitive damages, unless there was a probable consciousness on their part that such an accident would be the probable consequence of such defects. Nor are punitive damages allowable where the accident was due to the concurrence of a latent defect, not discoverable with the known defect, and where it could not have occurred without such latent defect.

Admissibility of Evidence in Reference to Defective Track and Roadbed.—See *Stewart v. Everts* (Wis.), 44 Am. & Eng. R. Cas. 313, note 318 and cases there cited.

In *Jacksonville & S. E. R. Co. v. Southworth*, (Ill. Nov. 1, 1890,) 25 N. E. Rep. 1093, it was held that where in an action by a passenger against a railroad company the negligence charged is the rapid running of the train over an imperfect track, it is competent to show the condition of the track over which the train had to pass to reach the point where the accident occurred. And where the defects in the track consist in faults of construction, evidence as to the condition of the track six months after the accident is admissible in connection with evidence showing that the track had remained substantially the same.

In a North Carolina case, *Grant v. Raleigh & G. R. Co.* (N. Car. May 12, 1891,) 13 S. E. Rep. 209, the injury for which the action was brought resulted from an accident at a switch. The court held that the exclusion of the question whether there was not a subsequent accident at the same switch, was harmless error, where another witness testified as to such accident. It was also held that evidence of the condition of the defendant's track at other places and of other switches in the same vicinity was inadmissible.

In Alabama it is held that where the complaint only charges defendant railway company with negligently performing its duty to a passenger, whereby the car in which he was ran off the track and he was injured, evidence is admissible of defects in the track that may have caused the accident. *Richmond & D. R. Co. v. Vance* (Ala. June 24, 1891,) 9 So. Rep. 574.

GLEESON

v.

VIRGINIA MIDLAND R. CO.

(140 *United States*, 435.)

Injury to Passenger—Landslide—"Act of God"—Liability of Company.—A landslide in a cut through which a railroad passes, caused by an ordinary fall of rain, is not an "act of God" which will exempt the railroad company from liability for injury to passengers caused thereby. The failure of the railroad company to so construct the banks of its cuts that they will not slide by reason of the action of ordinary causes and to carefully inspect them, is negligence which entails liability for injuries to passengers caused by the banks giving way.

Same—Same—Presumption of Negligence—Burden of Proof.—When a passenger on a railroad train is injured owing to a landslide, a presumption of negligence on the part of the company arises, and the burden is upon it to show that the slide was the result of causes beyond its control.

IN error to the Supreme Court of the District of Columbia.

This is an action for damages, brought in the supreme court of the District of Columbia. It appears from the bill of exceptions that at the trial the evidence introduced by the plaintiff tended to show that in January, 1882, he was a railway postal clerk, in the service of the United States post office department; that on Sunday, the 15th of that month, in the discharge of his official duty, he was making the run from Washington to Danville, Va., in a postal car of the defendant, and over its road; that in the course of such run the train was in part derailed by a landslide which occurred in a railway cut, and the postal car in which the plaintiff was at work was thrown from the track upon the tender, killing the engineer and seriously injuring the fireman; and that the plaintiff, while thus engaged in performing his duty, was thrown violently forward by the force of the collision, striking against a stove and a letter box, three of his ribs being broken and his head on the left side contused, which injuries are claimed to have permanently impaired his physical strength, weakened his mind, and led to his dismissal from his office, because of his inability to discharge its duties. Defense was made by the company under these propositions: That the landslide was caused by a rain which had fallen a few hours previous, and therefore was the act of God; that it was a sudden slide, caused by the vibration of the train itself, and which, therefore, the company was not chargeable with, since it had, two hours before, ascertained that the track was clear; and that the injury resulted from the plaintiff's being thrown against the postal car's letter box, for which the company was not responsible, since he took the risk incident to his employment. At the close of the testimony, the court, having given to the jury certain instructions in accordance with the requests of the plaintiff, charged the jury, at defendant's request, as follows: "(1) The burden of proof is on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury. (2) The jury are instructed that the plaintiff, when he took the position of a postal clerk on the railroad, assumed the risk and hazard attached to the position, and if, in the discharge of his duties as such, he was injured through the devices in and about the car in which he was riding, properly constructed for the purpose of transporting the mails, the railroad is not liable for such injury, unless the same were caused by the negligent conduct of the company or its employes. (3) The court instructs the jury that, while a large degree of caution is exacted generally from railway companies in order to avert accidents, the caution applies only to those accidents which

could be prevented or averted by human care and foresight, and not to accidents occurring solely from the act of God. If they believe that the track and instruments of the defendant were in good order, its officers sufficient in number and competent, and that the accident did not result from any deficiency in any of these requirements, but from a slide of earth caused by recent rains, and that the agents and servants of the company had good reason to believe that there was no such obstruction in its track, and that they could not, by exercise of great care and diligence, have discovered it in time to avert the accident, then they should find for the defendant. (4) If the jury believe from the evidence that the defendant's instruments, human and physical, were suitable and qualified for the business in which it was engaged; that the accident complained of was caused by the shaking down of earth which had been loosened by the recent rains, and that the earth was shaken down by the passing of this train,—then the accident was not such an act of negligence for which the defendant would be responsible, and the jury should find for the defendant." The counsel for the plaintiff objected to the granting of the first of these prayers, and asked the court to modify it by adding the words "but that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordinary care, is *prima facie* evidence of the company's liability." But the court refused to modify the said prayer, and the plaintiff duly and severally excepted to the granting of each one of said prayers on behalf of the defendant, and to the refusal of the court to modify the said first prayer, as requested. The jury, so instructed, found for the defendant, and judgment was rendered accordingly. That judgment having been affirmed by the court in general term, (5 Mackey 356,) this writ of error was taken.

I. H. Ford and Guion Miller, for plaintiff in error.

Linden Kent, for defendant in error.

LAMAR, J.—It will be most convenient in the decision of this case to consider the third instruction first. The objections made to it are three: (1) "It assumes that the accident was caused by an act of God, in the sense in which that term is technically used." It appears that the accident was caused by a landslide, which occurred in a cut some 15 or 20 feet deep. The defendant gave evidence tending to prove that rain had fallen on the afternoon of Friday and on the Saturday morning previous; and the claim is that the slide was produced by the loosening of the earth by the rain. We do not think such an ordinary occurrence is embraced by the technical phrase "an act

Landslide not
an act of God.

of God." There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightning, earthquakes, sudden deaths and illnesses, have been held to be "acts of God;" but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered. In *Dorman v. Ames*, 12 Minn. 451, (Gil. 347,) it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary, and reasonably to be anticipated at certain seasons of the year; and we think the same principle applies to this case. *Ewart v. Street*, 2 Bailey, S. Car. 157, 162; *Moffat v. Strong*, 10 Johns. (N. Y.), 11; *New Brunswick Steamboat & Canal Transp. Co. v. Tiers*, 24 N. J. Law, 697; *Railway Co. v. Braid*, 1 Moore P. C. (N. S.) 101. (2) The instruction does not hold the defendant "responsible for the condition of the sides of the cut made by it in the construction of the road, the giving way of which caused the accident." We think this objection is also well taken. The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary, and both are intended for one result, which is the production of a level track over which the trains may be propelled. The cut is made by the company no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is) in the erection of the fills and the necessary bridges to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause landslides and consequent dangerous obstructions to the track itself from ill-constructed railway cuts. To all intents and purposes a railroad track which runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the *débris* created by the common processes of nature is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would to be overbalance the priceless lives

of the traveling public by a mere item of increased expense in the construction of railroads; and after all, an item, in the great number of cases, of no great moment.

In a late case in the queen's bench division,—*Tarry v. Ashton*, 1 Q. B. Div. 314,—two out of three judges declared in substance that a man who, for his own benefit, suspends an object, or permits it to be suspended over the highway, and puts the public safety in peril thereby, is under an absolute duty to keep it in such a state as not to be dangerous. The facts of the case were these: The defendant became the lessee and occupier of a house from the front of which a heavy lamp projected several feet over the public foot pavement. As the plaintiff was walking along in November, the lamp fell on her, and injured her. It appeared that in the previous August the defendant employed an experienced gasfitter to put the lamp in repair. At the time of the accident a person employed by defendant was blowing the water out of the gas pipes of the lamp, and in doing this a ladder was raised against the lamp iron, or bracket, from which the lamp hung; and on the man mounting the ladder, owing to the wind and wet, the ladder slipped, and he, to save himself, clung to the lamp iron, and the shaking caused the lamp to fall. On examination, it was discovered that the fastening by which the lamp was attached to the lamp iron was in a decayed state. The jury found that there had been negligence on the part of the defendant personally; that the lamp was out of repair through general decay, but not to the knowledge of the defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that, if the lamp had been in good repair, the slipping of the ladder would not have caused the fall. Upon this it was held by LUSH and QUAIN, JJ., that the plaintiff was entitled to a verdict on the ground that if a person maintains a lamp projecting over the highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by; and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it. 1 *Thomp. Neg.* 346, 347. The case of *Kearney v. London, B. & S. C. R. Co.*, L. R. 6 Q. B. 759, 762. (in the exchequer chamber,) cited in the brief of counsel for plaintiff in error, is directly in point. In that case the plaintiff had been injured while walking along a public highway, by a brick which fell from a pier of the defendant's bridge. A train had just passed, and the counsel for the defendant submitted that there was no evidence of negligence. The court (KELLY, Chief Baron) says: "There can be no doubt that it was the duty of the defendants, who

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for its neg-
ligence.

had built this bridge over the highway, to take such care that, where danger can be reasonably avoided, the safety of the public using the highway should be provided for. The question, therefore, is whether there was any evidence of negligence on the part of the defendants; and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury. The lord chief justice in his judgment in the court below, said *res ipsa loquitur*, and I cannot do better than to refer to that judgment. It appears without contradiction that a brick fell out of a pier of the bridge without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose; for otherwise so slight a vibration could not have struck it out of its place. * * * The bridge had been built two or three years, and it was the duty of the defendants from time to time to inspect the bridge, and ascertain that the brick work was in good order, and all the bricks well secured." The principle of these decisions seems to us to be applicable to this case. If such be the law as to persons who, for their own purposes, cause projections to overhang the highway not constructed by them, *a fortiori* must it be the law as to those who, for their own purposes of profit, undertake to construct the highway itself, and to keep it serviceable and safe, yet who allow it to be practically overhung, from considerations of economy or through negligence. We think the case of *Virginia R. Co. v. Sanger*, 15 Gratt. (Va.), 237, to which we are referred by counsel for plaintiff in error, is strongly illustrative of the principle in this case, to which it bears a close resemblance. Some rocks had been piled up alongside of the track for the purpose of ballast, and some of them got upon the track, causing the injury. In rendering its opinion the court says: "Combining in themselves the ownership as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and all the subsidiary arrangements necessary to the safety of the passengers. And, as accidents as frequently arise from obstructions on the track as perhaps from any other cause whatever, it would seem to follow, obviously, that there is no one of the duties of a railroad company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions." See also, *McElroy v. Nashua & L. R. Corp.*, 4 Cush. (Mass.), 400; *Hutch. Carr. p.* 524; *Bennett v. Louis-*

ville & N. R. Co., 102 U. S. 577, 1 Am. & Eng. R. Cas. 71. This view of the obligation of the company of course makes it immaterial that the slide was suddenly caused by the vibration of the train itself. It is not a question of negligence in failing to remove the obstruction, but of negligence in allowing it to get there.

We are also of the opinion that it was error to refuse to modify the first instruction for the defendant as requested by the plaintiff. Since the decisions in *Stokes v. Saltonstall*, 13 Pet. (U. S.), 181, and *New Jersey R. & Transp. Co. v. Pollard*, 22 Wall. (U. S.), 341, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in *Inland & S. Coasting Co. v. Tolson*, 139 U. S. 551. The defendant seeks to uphold the action of the court in refusing the modification prayed for, by distinguishing the case at bar. It attempts to make two distinctions: (1) That the operation of the rule is confined to cases "where the accident results from any defective arrangement, mismanagement, or misconstruction of things over which the defendant has immediate control, and for the management, service, and construction of which it is responsible, or where the accident results from any omission or commission on the part of the railroad company with respect to these matters entirely under its control." (2) That the injury from an act of God is established as a fact, wherefore the presumption of negligence from the occurrence of the accident cannot arise. Neither of these attempted distinctions is sound, since, as has been shown, the defect was in the construction of that over which the defendant did have control, and for which it was responsible, and since the slide was not caused by the act of God, in any admissible sense of that phrase. Moreover, if these distinctions were sound, still, as a matter of correct practice, the modification should have been made. The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence of the accident the defendant must answer

Presumption
of negligence
— Burden of
proof.

that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances. But when the court refuses to so frame the instructions as to present the rule in respect to the *prima facie* case, and so refuses on either of the grounds by which the refusal is sought to be supported herein, it leaves the jury without instructions to which they are entitled to aid them in determining what were the facts and causes of the accident, and how far those facts were or were not within the control of the defendant. This is error. Judgment reversed, and cause remanded, with direction to order a new trial, and to take further proceedings not inconsistent with this opinion.

BREWER, J., dissented from the opinion and judgment in this case on the ground that it is in contravention of the long established rules as to what may be considered on an incomplete record.

What Constitutes an "Act of God."—This subject is discussed in a note in 2 Am. & Eng. R. Cas. p. 171. The article upon this subject in volume 1 of the Am. & Eng. Encyclopaedia of Law, p. 173, also contains a very complete collection of authorities.

An earthquake is an "act of God" and a railroad company is not liable for damages occasioned by injury to freight caused thereby. *Slater v. South Carolina R. Co.*, 29 S. Car. 96, 35 Am. & Eng. R. Cas. 625. And an extraordinarily violent storm is an "act of God." *Baltimore & O. R. Co. v. Sulphur Springs Independent School District*, 96 Pa. St. 65, 2 Am. & Eng. R. Cas. 166. Great floods and high water may constitute an "act of God." *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552, 35 Am. & Eng. R. Cas. 618. But freezing water cannot be deemed the "act of God," and does not come within the definition given of that term. *McGraw v. Baltimore & O. R. Co. (W. Va.)*, 9 Am. & Eng. R. Cas. 188. A wind storm which blows the car from the track is an "act of God." *Blythe v. Denver & R. G. R. Co.*, 15 Colo. 333, abstracted, 45 Am. & Eng. R. Cas. 337.

Break in Track Caused by Flow of Water—Extraordinary Rain.—In *Texas & Pacific R. Co. v. Barron* (Tex. Nov. 17, 1800), 14 S. W. Rep. 698, which was an action for an injury to a passenger, it appeared that the accident was caused by a break in the track resulting from a flow of water during a rain. There was a verdict and judgment for the plaintiff. *Held*, that the defendant was not entitled to a new trial, the evidence being conflicting as to whether the rainfall was unusually great.

Accident Caused by Breaking of Spring Rail—Necessity for Expert Testimony.—Expert evidence of blacksmiths or other workers in metal is not indispensable in order to show that the "spring rail" of a railroad switch the breaking of which caused the accident, was, or appeared to be, sound, and made of fit material. The jury may regard other evidence as sufficient to vindicate the company's diligence. *Crawford v. Georgia Pac. R. Co.* (Ga. Oct. 8, 1890), 12 S. E. Rep. 176.

Injury to Passenger Caused by Washout of Culvert—Breaking of Dam on Adjoining Property.—In *Bonner v. Wingate*, 78 Tex. 333, it was held that in an action against a railroad company for injuries to a passenger occasioned by a washout at a culvert, the fact that the culvert would not have given way but for the breaking of a dam on adjoining property over which the company had no control will not prevent recovery, if the negligent manner in which the culvert was constructed contributed to the accident.

Defective Track—Admissions by President of Construction Company to Newspaper Reporter—Evidence.—The case of *Chattanooga R. & C. R. Co. v. Liddell*, 85 Ga. 482, was an action against a railroad company by a passenger for injury received in an accident while the road was being operated by a construction company. It appeared that the president of such company, who was not at the place of the accident, admitted several hours afterwards to a reporter that it would be to his interest not to publish too much about the accident; that the track was put there temporarily etc.; and that he did not want public opinion too strong against him. *Held*, that these admissions were not admissible against the railroad company as they were neither part of the *res gestæ* nor made in the performance of his duty.

Road not Open for Regular Passenger Trains—New Roadbed—Assumption of Risk by Passenger.—In an action by a passenger on a railroad train for personal injuries, a charge that "if defendant's road had not yet been opened for the running of regular passenger trains, and only mixed trains, such as plaintiff was on, were run thereon, and the roadbed was new, and the plaintiff knew at the time he entered said train that such was the case, then the defendant would not be expected to apply all the checks and guards that are in use upon established passenger lines, and the passenger would be presumed to take such risks as were necessarily incident to the new condition of the track and the train upon which he traveled," is as favorable to defendant as it has the right to expect, and it was not error to refuse a special request that "if you find from the evidence that defendant's road was new and properly constructed, and that the wrecked train was properly run by its employes, and if you further find from the evidence that the wreck was caused by the washing of the dirt from under the ties by recent rains, and that defendant did not know of the fact, and had no time to learn of the fact before the wreck occurred, by the exercise of reasonable diligence, you will find for the defendant." *San Antonio & A. P. R. Co. v. Robinson* (Tex. Feb. 17, 1891), 15 S. W. Rep. 584.

Train Leaving One Track and Running into Cars on Another Track.—In *Grant v. Raleigh & G. R. Co.* (N. Car. May 12, 1891), 13 S. E. Rep. 209, it was held that, where an accident is occasioned by a train leaving the main track at a switch, and then running into freight cars standing on side track, leaving such freight cars standing on the side track, is not negligence where they do not interfere with travel when the tracks are in order.

Same—Evidence as to Chock-Block.—In *Stouter v. Manhattan R. Co.*, (N. Y. June 2, 1891), 27 N. E. Rep. 805, which was an action for personal injuries, occasioned by an engine running into the coach where plaintiff was sitting, a diagram representing the scene of the accident was shown to the engineer who operated the engine, and he stated that it was correct except that it showed a chock-block at the junction of the tracks, which was not there when the accident happened. *Held*, that a judgment for plaintiff will not be reversed on the ground that such statement was evidence that after the accident defendant had placed a chock-block at the junction of the tracks to prevent further accident. *Held*, also that a general objection to a question put to the engineer as to whether the accident would have happened had there been a chock-block at the junction does not raise the point that the evidence is inadmissible because it had not

been shown that the junction was previously unsafe, or that chock-blocks were in practical use.

Injury Caused by Derailment—Sufficiency of Averments.—In an action for injuries sustained in a railroad accident, an averment that the car in which plaintiff was riding was derailed through the negligence of the railway company and its servants, whereby the plaintiff was injured, is sufficiently specific. *Gulf, C. & S. F. R. Co. v. Wilson* (Tex. Jan. 27, 1891), 15 S. W. Rep. 280.

Derailment Caused by Collision with Animal—Failure to Fence—Negligence.—Where the derailment was caused by a collision with a calf on the track, which could have been seen 600 feet in advance of the train, and the railroad company failed to fence its track, having that right, these facts are sufficient to show negligence. *Gulf, C. & S. F. R. Co. v. Wilson* (Tex. Jan. 27, 1891), 15 S. W. Rep. 280.

GRAHAM *et al.*

v.

PENNSYLVANIA CO.

(*Pennsylvania Supreme Court, January 5, 1891.*)

Defective Station Platform—Injury to Passenger—Opinion Evidence is inadmissible upon the question whether a platform around a railroad station is dangerous to passengers alighting from trains.

Contributory Negligence of Passenger Using Station Platform.—When a railroad company provides a station platform which may be used without danger by passengers exercising ordinary care, it has done its duty so far as the right of the passenger who is injured upon such platform to recover damages is concerned. The want of ordinary care by a passenger in using such platform is a bar to recovery.

APPEAL from Allegheny Court of Common Pleas.

Action of trespass for damages sustained from defendant's negligence. Plaintiff alighted from a train on the Pittsburgh, Fort Wayne & Chicago Railroad, of which the defendant company is the lessee, at the Federal Street station, Allegheny city, on the evening of February 8, 1888. She stepped from the car upon a narrow platform or broad step, four feet wide and nine inches high, which extended the entire length of the platform. She did not know of its existence, and started towards the exit, supposing that she was on the main platform. As she stepped off the elevation she fell and broke her leg. At the trial witnesses for plaintiff, who were not called as experts, testified that in their opinion the platform was dangerous to passengers alighting from trains. Verdict for plaintiff for \$3,000. After rule for new trial was discharged, judgment was entered thereon, and defendant appealed, assigning for error (1 and 2) the admission in evidence of the expression of witnesses' opinions that the platform where the accident occurred was dangerous; (3, 4, and 5) the

court's answers to defendant's points, which, with the answers thereto, were as follows: "*Second.* The duty of the defendant company is to use ordinary care in the construction of its platforms, and, if the jury believe that the platform on which the plaintiff fell was reasonably safe, and one which could be used without danger by a passenger exercising ordinary care, then their verdict should be for the defendant. Answer. This point is refused. *Third.* If the jury believe that the alleged defect in the platform was a patent one (that is, open and visible), and that there was sufficient light for a person using ordinary care to see and avoid the danger, then their verdict should be for the defendant. Answer. We cannot say that because the offset in the platform was open and visible, there being sufficient light to see it by a person exercising ordinary care, that the plaintiff cannot recover, without explaining to the jury what constitutes ordinary care under the circumstances of this case. The question here is, did the plaintiff use or exercise ordinary and proper care on the occasion in question? Here you will consider the facts in evidence. She says she did not know of the offset in the platform. The evidence shows such an offset is not usual in platforms used for the debarking of passengers from railway cars, but, on the contrary, indicates that the usual method was to have the platforms level after they were reached. Passengers are not bound to anticipate and look out for irregularities or offsets which might cause one to fall. Under ordinary circumstances, a passenger has a right to expect an ordinary and usually level and safe exit to the depot or station after he has left the cars, and has, therefore, a right to go along the platform, only exercising such care as would be reasonable and proper under circumstances he was bound to anticipate. With this explanation the point is affirmed. *Fourth.* If the jury believe from the evidence that the distance from the lowest step of a car to the ground is about seventeen inches, and that that distance is greater than children or women can with reasonable comfort and safety step, then it is the duty of the defendant to provide some intermediate step for them at stations; and if the jury believe that the narrow, raised platform or step from which Mrs. Graham fell was placed there for that purpose, and was such a device as could be used by a passenger exercising ordinary care, without injury, then their verdict should be for the defendant. Answer. This point is refused. We think the proposition is too broad. It means, if I understand it, that if one using ordinary care could use the platform without injury the plaintiff cannot recover. This would seem to say, if affirmed, that because one exercising due care was not hurt, therefore one who was hurt

did not exercise due care, proper care, which we think does not follow, either as a matter of fact, or as a principle of law. I may be exercising due care, and may be getting along perfectly well, because I may see danger, and, if I see it, I am bound to expect it. If I do not, and fall down, I am not exercising due care, because I know it is there. You do not know it is there, and you fall down; it may be due care. The thing I do would be negligence in me and yet due care in you.

John H. Hampton, William Scott and George B. Gordon, for appellants.

Petty & Friend and R. B. Petty, for appellees.

MITCHELL, J.—That the opinions of witnesses are in some cases admissible as evidence, even when not coming properly under the head of “expert testimony,” has long been established in practice. In several classes of questions the line between the witness’ judgment or opinion and his affirmation of a fact is so indistinct that it cannot be marked out in practice.

Such are questions of identity of persons or things, of the lapse of time, of comparative shape or color or sound, of expression, and, through it, of meaning, etc. In all of these, however positively the witness may affirm facts, what he says is after all only his opinion, but so blended with knowledge and recollection that the line where opinion ends and fact begins cannot be distinguished. Hence both must be admitted or both excluded, and to do the latter is often to shut out the only light the case admits of. In questions, therefore, of identity, of sanity, of handwriting, and some others of like nature, opinions of witnesses having sufficient knowledge of the particular circumstances to form the basis of a responsible judgment have been admitted without hesitation. Such is the elementary doctrine laid down in Greenleaf and other authoritative works, but the theory on which such evidence is admitted is very slightly developed. The cases, however, have extended far beyond the classes mentioned in the text books, and may be said not only to have become legion, but legion against legion. An examination of a large number of them, while not enabling us to reconcile all the practical applications, does, we think, show that the ground on which such evidence must always rest, as expert testimony, strictly so called, does, is a clear necessity. One of the earliest and strongest cases, since constantly cited in favor of the admission of such testimony, is *Porter v. Pequonoc Manuf. Co.*, 17 Conn. 249 (1845), where the opinions of observers, not professional engineers or builders, were al-

Opinion evidence as to safety of structure not admissible.

lowed to be given as to the sufficiency of a dam to stand the pressure of a flood, which it was contended ought to have been anticipated. The case is decided without any abstract discussion, but the germ, at least, of the principle may be found in the following language of STORRS, J. "It is impossible for a person, however skillful or scientific, to give an intelligent opinion on facts testified to by another witness in the manner in which they are frequently related. Such witness may detail in the best manner he can the facts on the subject of which the opinion of a scientific person is sought; but it may be impossible to extract from his testimony the *data* for such an opinion with sufficient precision and certainty." In the following year (1846) the supreme court of Vermont, in *Clifford v. Richardson*, 18 Vt. 620, put the principle still more clearly, thus: "When all the pertinent facts can be sufficiently detailed and described, and when the triers are supposed to be able to form correct conclusions without the aid of opinion or judgment from others, no exception to the rule is allowed. But * * * the facts are sometimes incapable of being presented with their proper force and significance to any but the observer himself. * * * Under these circumstances, the opinions of witnesses must of necessity be received." This states very clearly and forcibly the principle and the limits of its application. In those matters where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact. It is thus expressed in *Com. v. Sturtivant*, 117 Mass. 122, where a large number of illustrations are given, some of which, I may say in passing, seem to us extremely questionable: "The exception * * * includes the evidence of common observers testifying to the results of their observation, made at the time, in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury." But, as necessity is the ground of admissibility, the moment the necessity ceases the exception to the general rule that requires of a witness facts and not opinions ceases also. Hence, whenever the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible. This is well stated by Chief Justice SHAW in *New England Glass Co. v. Lovell*, 7 Cush. (Mass.), 321: "The principle upon which this evidence is admissible is clear and entirely just. In applying evidence which does not go di-

rectly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two duties to perform: *First*, * * * to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends on experience * * * Now when this experience is of such nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference." The law is thus summed up in the Am. & Eng. Encyclopedia Law, tit. "Expert and Opinion Evidence," VI. "Opinions are never received if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and understanding. The ordinary affairs of life cannot be the subject of expert testimony." See volume 7, p. 493, and cases there cited.

This examination of elementary principles and general authorities has seemed necessary because our own cases on the exact point are few, and supposed not to be in entire harmony. Passing by the cases where opinions not of experts have been received practically without challenge upon questions of sanity, identity, etc., the first case on the subject is *Beatty v. Gilmore*, 16 Pa. St. 463. Defendant was building a house on Market Street, Harrisburg, and had left an area-way from the street into the basement, without a guard or railing, and the plaintiff fell into it. Witnesses were allowed to state their opinion that it was dangerous. This was held to be proper, and the case has been accordingly cited, as in favor of the general admissibility of such evidence; and BELL, J., does say that it is "a species of testimony always resorted to in cases like the present." But it appears from the report that there was a porch projecting beyond the area, and that, to fall, a person would have to turn aside from the direct way. It is not, therefore, clear that the mere description of the place would convey to the jury an adequate idea of it with reference to the danger, and this seems to have been in the mind of the court, from the language of the opinion, that testimony as to the dangerous character of the excavation "was, in truth, rather the assertion of a fact dependent in some measure upon opinion than of an abstract opinion without more." That this was the *ratio decidendi* also appears probable from the cases cited in the opinion, which are clearly cases where the circumstances were incapable of adequate description. So understood, *Beatty v. Gilmore* is entirely in the line of the best authorities heretofore cited. If not to be so understood, then it must be considered as mate-

rially modified by the cases hereafter to be noticed. The next case, *Springs Imp. Co. v. Coon*, 10 Wkly. Notes Cas. 502, was clearly in the same line. The opinions of witnesses as to the violence and unusual character of the storm were certainly necessary to supplement their descriptions, and, as to anything beyond that, this court said that if the witness "had any claims to the character of an expert" the court below would not be reversed on a matter so much within its discretion. The only other case is *Franklin F. Ins. Co. v. Gruver*, 100 Pa. St. 266, in which it was held that an insurance expert could not be permitted to give his opinion that the erection of a frame building next to the building insured increased the risk in fact. The basis of decision was indicated in the opinion of GORDON, J.: "How any person can be said to be an expert in that which must necessarily result from observation so general that it must be common to every person we cannot understand." In the same general line are *American Steam-Ship Co. v. Landreth*, 102 Pa. St. 135, and *Lombard, etc. Pass. R. Co. v. Christian*, 124 Pa. St. 125, though in both of these the admissibility of the testimony was discussed rather as declarations of agents than as opinions necessary for the information of the jury. From this view it appears that our own cases are not really in conflict with each other, and that certainly the latest and most authoritative of them are in harmony with the best elementary doctrine. Some occasional difference in application may be unavoidable, because, as said by Chief Justice SHAW in *New England Glass Co. v. Lovell*, *supra*, there is extreme difficulty in laying down any rule precise enough for practical application, and the only proper course is to keep the principle steadily in view, and apply it according to the circumstances of each case. In the present case the alleged dangerous place was a raised part of the platform, or broad step, four feet wide and nine inches high. It came clearly within the range of ordinary experience. The briefest statement would convey a perfect comprehension of the place, and every jurymen who ever got in or out of a car, or went up or down a flight of steps, was as capable of judging of the alleged danger as the witnesses who gave their opinions. The first and second assignments of error must be sustained.

The third, fourth, and fifth assignments must also be sustained. There is no situation in which ordinary care is not required of a plaintiff, and want of it a bar to recovery. *Delaware, L. & W. R. Co. v. Cadow*, 120 Pa. St. 559, 35 Am. & Eng. R. Cas. 405. It is necessary to discuss now whether the railroad company was bound in its platforms and approaches to use the

Plaintiff's
contributory
negligence.

very utmost degree of care, as it is to passengers during actual carriage. If the result in fact was a platform which could be used without danger by a passenger exercising ordinary care, then the company had done its duty, so far as this plaintiff was concerned; and, as its points were based on the finding of this fact by the jury, they should have been affirmed. *Delaware, L. & W. R. Co. v. Napheys*, 90 Pa. St. 135, 1 Am. & Eng. R. Cas. 52. In the *Napheys' Case* the absence of a step or elevation in the platform was the only negligence alleged, and on it the jury found a verdict for the plaintiff. In the present case the presence of such an elevation seems to have been sufficient for the jury to find negligence and a verdict for the plaintiff. Defendant's counsel, for reasons which are not apparent to us, omitted to ask for a non-suit, or a peremptory direction in their favor. Notwithstanding the omission, however, it is clear that the admitted facts fail to establish any negligence of defendant, and that the plaintiff must, as a matter of law, always fail to recover. It would therefore be useless to send the case back for another trial. Judgment reversed.

Opinion Evidence as to Dangerous Character of Places, Structures or Appliances.—See *Indiana, etc. R. Co. v. Hale* (Ind.), 19 Am. & Eng. R. Cas. 562; *Wood v. Chicago, etc. R. Co.* (Wis.), 6 *Id.* 612; *Lawson v. Chicago, etc. R. Co.* (Wis.), 21 *Id.* 249; *Jeffrey v. Keokuk, etc. R. Co.* (Iowa), 5 *Id.* 568; *Burlington, etc. R. Co. v. Coates* (Iowa), 15 *Id.* 265; *Street R. Co. v. Nolthenius* (Ohio), 19 *Id.* 191; *Laughlin v. Street R. Co.* (Mich.), 26 *Id.* 377; *Bemis v. Central R. Co.* (Vt.), 25 *Id.* 138; *Chicago, etc. R. Co. v. Moranda* (Ill.), 17 *Id.* 564; *Marcott v. Marquette, etc. R. Co.* (Mich.), 8 *Id.* 306; *Couch v. Charlotte, etc. R. Co.* (S. Car.), 28 *Id.* 331.

Injuries at Station Platform—Evidence as to Similar Accidents at other Stations.—In *Brady v. Manhattan R. Co.* (N. Y.), 27 N. E. Rep. 368, which was an action for an injury to a passenger, received while alighting from an elevated railroad car owing to such passenger stepping between the car and the platform, it was held that evidence that similar accidents had happened at other stations is not admissible, unless it is first shown that the conditions were similar. PARKER, J., said: "Proof of the happening of a prior accident in the same place has frequently been held to be competent upon the ground that it tends to show that, tested by actual use, the place of the accident has been demonstrated to be unsafe and dangerous, but our attention has not been called to a case where proof of the occurrence of an accident in some other place has been held to be proper for that purpose. We think, however, that in a case like that before us the evidence may become proper where evidence is first adduced tending to show that the conditions are similar. If, for instance, the platform of the station at Franklin square had been on a straight line, as in this case, and the distance from the station platform to the car the same as here, we see no reason why evidence of accidents occurring there should not be received if of such a character as would render evidence thereof competent had they occurred at the station in question."

See also as to evidence of similar accidents, note, 39 Am. & Eng. R. Cas. 447.

Failure of Company to Provide Platform or Lights at Station or to Render Passenger Assistance.—In *Alexandria & F. R. Co. v. Herndon*, (Va. Dec. 4, 1890), 12 S. E. Rep. 289, the accident which caused the injury for which the action was brought occurred at night, during a snow storm, while it was intensely dark, and the platforms of the cars were covered with snow. Plaintiff, a woman, was unattended, and was encumbered by heavy clothing and parcels. There was no platform at the station, and defendant's servants, though present, rendered plaintiff no assistance. *Held*, that it was not error to charge that, if there was no platform or other proper landing place at the stopping place, and defendant's servants rendered plaintiff no assistance in alighting, and if for want of such landing place and assistance plaintiff was injured without fault on her part, she could recover. *Held* also that it was proper to charge that, if the accident was caused by defendant's failure to light the stopping place, it was liable, where there was evidence that there were no lights. The court said: "As to the second instruction, we are of opinion that there was evidence upon which to found it, and that the proposition of law therein contained, as to the neglect to light stations and platforms, is supported by abundant authority. In *Reed v. Axtell*, 84 Va. 238, this court said: 'The law undoubtedly impresses upon a railroad company the duty of keeping its stations and premises in such safe condition as that its passengers, in the exercise of ordinary care, can get upon or leave the same, or go wherever they are expressly or impliedly invited to go, without injury; and this embraces suitable steps and platforms as well as suitable lights. *Keefe v. Boston & A. R. Co.*, 142 Mass. 251, 27 Am. & Eng. R. Cas. 137; 2 Wood, Ry. Law, § 310, and cases cited.' See also, *Railroad Co v. Morris*, 31 Gratt. (Va.), at page 207, where this court, per BURKS, J., after stating that the conductor should have cautioned the passenger not to attempt to get off until the train stopped, said: 'The company was also in fault in not having stationary lights. * * * And this defect made it all the more incumbent upon the conductor to exercise more than usual care and caution in letting off passengers.' This language is peculiarly appropriate in the present case, where an unattended and incumbered female passenger was permitted to go forth from the train wholly unaided, and to grope her way in the midst of a fierce storm and intense darkness."

Passenger Stepping in Hole in Unlighted Platform—Contributory Negligence.—A passenger alighting from a train upon a station platform cannot be considered guilty of contributory negligence in stepping into a hole in such platform, where he testifies that there were no lights except from a hotel near by and the car windows, and that he did not see the hole until he stepped into it although he might have done so had he looked for it, and the testimony of the defendant's witnesses, being of a vague character, is to the effect that the passenger might have seen the hole had he "looked carefully." *Watson v. Oxanna Land Co.*, (Ala. Jan. 30, 1891), 8 So. Rep. 770.

Injury to Passenger Going from Car upon the Platform—Two Exits, one Safe and the other Unsafe.—The fact that a railroad company has provided a safe exit from its cars to its station platform, does not compel the passenger at his peril, to ascertain this fact and to avail himself of that way, when he sees that another way apparently safe, but in reality dangerous, is in general use by the passengers with the tacit permission of the servants of the company. Under such circumstances a passenger may avail himself of such plan of exit, and it cannot be declared as a matter of law, that it is negligent for him to do so. So *held*, where a passenger was injured while passing through a baggage department of a combination coach to the station platform by falling into an open space between such car and the platform, although at the other end of the car there was a proper

safe exit. *Missouri Pacific R. Co. v. Long*, (Tex., January 2, 1891), 16 S. W. Rep. 1016. The court said: "Can it be announced as a legal conclusion that a railroad company has discharged its whole duty to the passenger when it has provided a safe exit from its cars, while at the same time there exists another way, which is not safe, and which is in such a general use by its passengers as to induce the belief that it was provided, in part at least, for that purpose? We think not. A railroad company, it is true, is not bound to see that its passengers act in a prudent manner, or to use physical means to compel them to do so. But when its servants see that its passengers are in the habit of leaving its cars by a door not provided for the purpose, it would seem to be the duty of such servants at least to warn them that there is another door which they are expected to use. In this case there was testimony sufficient to warrant the jury in concluding that the side door was almost exclusively used by the passengers in making their egress from the car; and we cannot hold that there was not evidence to justify the findings that that way of egress was not safe for passengers, and that it was negligence on part of the company to permit it to be used as such."

Passenger Falling off Platform—Going from Depot in Unusual Direction—Unsafe Passageway—Absence of Light.—In *Texas & P. R. Co. v. Brown*, 78 Tex. 397, which was an action against a railroad company for injuries received by a passenger in falling off a platform at a depot on which he had alighted from a train in the night time, it was held that the court properly refused to instruct that if the depot had places prepared for the public where they could go in safety, then plaintiff could not recover if he received his injuries in going from the depot in a direction where the public did not usually go, and in a direction which had not been prepared for the public, as the negligence complained of was not that the company had not constructed a safe passageway, but that passengers were left to grope their way without sufficient light, and encounter dangers that could not be seen. Plaintiff, not being familiar with the surroundings, was put off the train on a low platform, and attempted to leave at the end in the direction he desired to go, and on account of the absence of light, was unable to see that there were no steps there. The way prepared by the company was zigzag in direction, and up several steps, and across a higher platform. *Held*, that the court properly charged that it was the duty of the company to provide good and safe places of egress from its platform at such places as persons would naturally or ordinarily go.

Platform at Station Constructed by Hotel Proprietor—Liability of Proprietor and Railroad Company for Injury to Passenger.—In *Watson v. Oxanna Land Co.*, (Ala., Jan. 30, 1891), 8 So. Rep. 770, it was held that one who, to give access to his hotel, constructs a bridge on the land of a railroad company, and turns it over to the company for its use, is not liable for personal injuries caused by a defect in the bridge due to the company's failure to repair it. But the railroad company is liable for personal injuries sustained by a passenger by reason of a defect in a platform erected near the tracks, on the company's station grounds, which it permits its passengers to use in going from the train to and from the hotel for meals, though the platform may have been erected by the owner of the hotel, who also agreed with the company to keep it in repair.

DEBBINS

v.

OLD COLONY R. CO.

(Massachusetts Supreme Judicial Court, September 12, 1891.)

Passenger—Injury at Station—Crossing Track.—At defendant's station where the plaintiff was injured, there were several tracks, and a waiting shed opposite the station, and planking between the station and the shed to allow passengers to cross the track on a level. The plaintiff approached the station on the side of the waiting shed intending to take a train which stood on the further track from that side. The platform gates on the side of the cars nearest plaintiff were closed. The plaintiff passed the gate on a sidewalk which was not obstructed by it, and began to cross the near track diagonally, intending to go around the rear of the train and go upon it. While crossing he was struck by another train. Plaintiff testified that before attempting to cross he glanced in the direction from which this train came and saw nothing, there being much steam and smoke hanging over the track. The engine which struck him had no headlight, and it was getting towards dusk. There was evidence that the train which struck plaintiff was not ringing its bell or sounding its whistle. *Held*, that the plaintiff was negligent, and judgment for the defendant should not be disturbed.

EXCEPTIONS from Superior Court, Suffolk County.

Action by Debbins against Old Colony Railroad Company to recover for personal injuries. Judgment for defendant. Plaintiff excepts. Exceptions overruled.

J. E. Cotter and *C. J. Jenney*, for plaintiff.

J. H. Benton, Jr., for defendant.

HOLMES, J.—This is an action for personal injuries. After the evidence was all in, the judge before whom the case was tried directed a verdict for the defendant; and the question is whether the direction was right. The plaintiff's evidence tended to prove the following facts: On October 22, 1888, the plaintiff came to the defendant's Spring Street station in Boston, intending to take the 20 minutes past 5 afternoon train for Dedham. He approached the station by Spring street, moving towards the northeast. When he reached it, he found his train already there, on the further track, and the gate across the street on his side closed. The station was a little to his right, on the further side of the track, with a waiting shed opposite, on the plaintiff's side, the platform of which extended to Spring street. There was planking between the station and the shed enabling passengers to cross the track on a level. The train extended

Case stated.

across this planking back partly across the Spring Street crossing, and the platform gates on the side of the cars nearest to the plaintiff were closed. The plaintiff passed the gate on the sidewalk, which was not obstructed by it, and began to cross the nearer track diagonally, on the line of Spring street, intending to go round the rear of the train, and to get upon it. While crossing he was struck by another train, coming in from Dedham. According to his own testimony, before doing so he glanced up the track towards Dedham, but saw nothing, there being much steam and smoke from the engine of his train hanging over the track between the station and the shed. The engine which struck him had no headlight, and it was getting towards dusk; but the plaintiff's evidence would not warrant the conclusion that the approaching train could not have been seen if the smoke had not concealed it. There was evidence that the train which ran the plaintiff down was not ringing its bell or sounding its whistle. The gateman was standing in the middle of the highway with his back to the plaintiff, but we see nothing favorable to the plaintiff in this fact.

As there is considerable difference of opinion among the members of the court, we shall not discuss this case further than to say that, in the opinion of the majority, if the provisions of Pub. St. chap. 112, § 213, apply, (which we do not decide), the plaintiff was guilty of gross or willful negligence within the exemption of that section. If he had been merely a traveler on the highway, and had undertaken to cross the track while the gate was closed knowing it to be so, he would have taken the risk of the consequences. We express no opinion as to the defendant's contention that he would have been a wrongdoer; but the case would not have been distinguishable from *Granger v. Boston & A. R. Co.*, 146 Mass. 276.

However, we assume, in favor of the plaintiff, that he had a right to enter the station, and to get upon the nearer platform in order to take a train, notwithstanding the fact that the gate was closed, and that if when within the gate he attempted to cross the track, he did not do so absolutely at his own risk; but he did so having the warning, which, but for the special exigency, would throw the risk upon him. The only way in which he could get rid of taking the risk was by using all the precautions which the circumstances would permit, and which would occur to a prudent man. One of these was to stop and look if the smoke over the nearest track was so dense that he could not see whether there was an engine approaching. *Fletcher v. Fitchburg R. Co.*, 149 Mass. 127, 134. He was warned that that track as

Plaintiff
guilty of neg-
ligence.

well as the other, might be specially dangerous at that moment. He was not acting under any excitement which might have excused a misjudgment, as in *Copley v. Northampton Co.*, 136 Mass. 6. He elected to go forward on the strength of a glance, when the train was so close upon him as to run him down before he could cross the track.

The distinction between negligence and gross or willful negligence is a distinction of degree, and therefore, of course, the latter cannot be defined once for all. But the same thing is true of the distinction between negligence and intent in ordinary cases. Yet the distinction exists, and may make the difference between manslaughter and murder. *White v. Dugan*, 140 Mass. 18, 20. *Com. v. Pierce*, 138 Mass. 165, 178. It seems to us that the negligence of the plaintiff in the present case was of the higher degree. In *Wheelock v. Boston & A. R. Co.*, 105 Mass. 203, the train which ran the plaintiff down was running at unusual speed, and there was thought to be some evidence of an invitation to him to cross the track as he did. But here the defendant hardly can be said to have invited the plaintiff to cross the track, seeing that its only act was to shut the gate in his face.

Exceptions overruled.

Passenger Run Over at Station—Evidence as to Rule Forbidding Trains to Pass Between Station and Another Train.—In *Lake Shore & M. S. R. Co. v. Ward* (Ill. Jan. 22, 1891,) 26 N. E. Rep. 520, plaintiff was a passenger suing for personal injuries. He charged in his declaration that the defendant was negligent in carelessly and improperly managing its locomotive, and in failing to provide suitable platform and railing for the safety of its passengers. *Held*, that a rule of the defendant company forbidding trains and engines to pass between a station and a passenger train which is receiving and discharging passengers, is admissible in evidence as tending to establish the charge of negligence, although not set out in the declaration.

Man Walking Towards Station with Intention of Buying Tickets is Not a Passenger.—A man walking towards a railroad station with the intention of buying a ticket and taking a train after he gets there, is not a passenger before he reaches the station, even if he might be one in the same place if he had begun his journey. *June v. Boston & A. R. Co.* (Mass. Jan. 9, 1891), 26 N. E. Rep. 238.

HUNTER *et al.**v.*

COOPERSTOWN & SUSQUEHANNA VALLEY R. CO.

(New York Court of Appeals, March 10, 1891.)

Passenger Boarding Moving Train—Contributory Negligence.—If a person standing upon a station platform in a safe position and under no stress of circumstances, attempts to get upon a train moving past him, at no matter what rate of speed, while in such proximity to a higher and projecting freight platform as to render the consequences of a false or misstep possibly, if not certainly, serious, such person alone is responsible for any injury which may result to him, and the railroad company is not liable if he is killed while making such attempt, although it is made at the direction of the conductor of such train.

APPEAL from Supreme Court, General Term, Fourth Department.

Action by Delora M. Hunter and another, as administrators, against the Cooperstown & Susquehanna Valley Railroad Company, for damages for the death of plaintiff's intestate. Plaintiffs obtained judgment. Defendant appeals.

E. M. Harris, for appellant.

Carlton B. Pierce, for respondents.

GRAY, J.—Upon a previous occasion we reversed a judgment recovered by these plaintiffs, and ordered a new trial upon the ground that the act of the deceased in attempting to board the moving train was reckless and dangerous, and contributed to the resulting injury. 112 N. Y. 371. As the case was then presented, the fact was established by the evidence for the plaintiffs that the speed of the train was from four to six miles an hour at the time the deceased jumped on, and, though it was substantially admitted that the attempt was negligence on his part, it was argued that the act was justified because requested or directed by the conductor of the train. That direction was in these words: "If you are going, jump on." But we held that that circumstance constituted no excuse for the dangerous act, inasmuch as it created no emergency calling for the immediate exercise of judgment in the choice between two dangers, and that it amounted to nothing more than a notification that the train would not stop or go slower. Upon this appeal the plaintiff's endeavor to sustain another judgment recovered against the company upon the new trial. They say that the

case, though "practically the same," differs from the previous case in a vital feature, namely, with respect to the speed of the train. Upon the new trial evidence was given by three witnesses that the speed of the train was between one and two miles an hour. Of these witnesses, two had previously testified to a speed of four to six miles an hour, and the other had not testified upon that subject. In view of the doubt justly resting upon the character and correctness of this evidence, we might very properly say that it was open to the court to take as the fact concerning the speed of the train in the evidence given by other witnesses in the case for both parties, which placed it at about six miles an hour. But we shall, for the purpose of the case, assume that the evidence as now given left it a question of fact as to how fast the train was moving past the station. We will accept that rate of speed deemed by the plaintiffs as most favorable to their contention, and still we must hold that the plaintiffs were not entitled to a recovery on their case. The conclusion was irresistible from the facts that the conduct of the plaintiff's intestate was negligent, and that his act contributed to his injuries and death. He was described as a quick, active man, 36 years of age, and in good health. He had lived several years in sight of the station, and had frequently taken the train there. On the morning in question, accompanied by a friend, he went to the station, and stood with him upon the freight platform of the station until the train came in sight. The deceased then descended the steps leading to the lower or passenger platform, and waited there, at a point some four or five feet away from the steps. The train slacked its motion, but did not stop, and, as the passenger-car approached, the conductor, standing at the forward end, said to them, "If you are going, jump on." The deceased made an effort to do so, but in some way, not exactly described, was caught and rolled between the moving train and the freight platform, near to which he was standing. Very probably, in the attempt to get upon the moving car, the deceased, not reckoning upon the nearness of the higher and projecting freight platform, struck against it, was thrown down and was forced between it and the train. Upon the facts, in what respect was the defendant guilty of negligence, and how was it responsible for the injury which resulted to the deceased? That the train did not stop at a particular or at a usual place, and ran beyond the station, would not charge the defendant with negligence, in the sense that it thereby caused the unfortunate result complained of. The deceased was under no obligation to board the train. In fact, he had no especial right to be carried by

Plaintiff
guilty of contributory negligence.

it. He had no ticket; but even if had one, that would not have placed the company under any contract to carry him upon that train. If its servants disregarded the time-table notice as to that station upon the morning in question, that fact did not entitle the deceased to disregard the usual prudential considerations which should govern human action, nor did it subject the defendant to a liability for the consequences of an attempt to get upon a train in motion. The invitation, request, or command of the conductor, however his words may be regarded, in no respect compelled the deceased to leave the place of safety upon the platform or to change his position. He was a free agent, and had the opportunity of choice between staying where he was and complying with the conductor's request. He could have waited for the train to come to a full stop, or for another train. The question of his convenience or inconvenience is of no consequence, and cannot enter as an element of the case. If a person, when in a safe position and under no stress of circumstances, attempts to get upon a train moving past him, at no matter what rate of speed, while in such a proximity to a known and prominent obstruction, such as was this freight platform, as to render the consequences of a false or misstep possibly, if not certainly, serious, we think that but one inference and opinion can be entertained. The act would be hazardous, and, however slight the chances of injury might have seemed to him, and whatever the motive or influence which induced the act, the individual would alone be responsible for the injury which might result to him. Sufficient responsibility is imposed upon these corporations in the operation of their roads already, without adding to it a further responsibility for the consequences of rash and unnecessary acts. The railroad and the trains upon it charge all persons, having anything to do with or about them, with the knowledge of possible dangers, and their presence imposes the duty of being vigilant and prudent, if responsibility for an occurring injury is to be escaped. It is unnecessary to refer to authorities bearing upon the question before us. That has been done by Judge PECKHAM in his opinion when this case was formerly before us. The only difference now is that the respondents claim the speed of the train as testified to was so very moderate as to take this case out of the effect of our previous decision, and to make it one for the jury to pass upon, with respect to the question of whether the act of the deceased was negligent. It is true that upon the previous appeal we laid stress upon the fact that the rate of speed was so rapid as to compel the judgment to pronounce it a reckless act to attempt to board the train. But we did not hold

that, if a train was moving much more slowly, the attempt, under the circumstances disclosed here, might be warrantable, or would raise a question for the jury to consider. It was said that there may be cases in which an attempt to get on or off a moving train would not be regarded as negligence as matter of law; and so there may be, but this is not one of those cases, inasmuch as the deceased was under no coercion nor obligation, and had no special right to be carried by that train. He was so placed that, while safe if he remained quiet and where he was bound to know, and must have known, that if he endeavored to get upon the moving train, and should fail to accomplish it upon the second, or should take a misstep, he incurred the risk of being thrown against the neighboring freight platform and injured. The case of a passenger who alights from a train moving past his destination, in compliance with the direction of a servant of the corporation as in the Filer Case, 49 N. Y. 47, cannot be altogether likened to the present case. In such a case there may be a stress of circumstances, in the passenger being obliged to choose between being carried away from the place where his duties or ties compelled his presence, and of endeavoring to alight, upon the direction or suggestion of the railroad employe. The question then might very properly be left to the jury for them to pronounce upon the character of the act; but even then, as it was held in the Filer Case, if the cars were moving at such a rapid rate as to charge the person with knowledge of the danger in the attempt, the act would be reckless, and no recovery could be had. To alight from or to board a train in motion is a negligent and hazardous act, which can only be made to appear excusable when, in the situation of the person, he is under such a coercion of circumstances as to raise a fair question as to whether he was really in the free possession and use of his faculties and judgment. *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 27 Am. & Eng. R. Cas. 155. Judge ANDREWS, in the case cited, held substantially as I have just stated. In his view there is less excuse in boarding a moving train than in alighting from it, and the distinction is obvious. The option, in the former case, is between an unnecessary and possibly dangerous act and the mere inconvenience of being left to take a later train. These views lead to the conclusion that the judgment below should be reversed, and a new trial ordered, with costs to abide the event.

EARL, FINCH, and PECKHAM, JJ., concur.

O'BRIEN, J., (*dissenting*).—When this case was here on a

former appeal, (112 N. Y. 371), it was held that the plaintiffs' intestate was guilty of negligence contributing to his death, because he attempted to board the train when running by the station at the rate of at least six miles per hour. As the case was then presented, the testimony conclusively established the fact that, at the time when the train was passing the platform on which the deceased stood, it was running at that rate of speed at least, if not even more. Now the case is here upon a very different state of facts. Upon the last trial, resulting in the judgment now under review, three witnesses called by the plaintiff testified that the train was running, at the time the deceased attempted to get on, at a rate of speed not to exceed from one to two miles per hour. One of these witnesses was the engineer who had charge of this very train when the accident happened, and another was the fireman. The defendant on the first trial gave no evidence in regard to the speed of the train, but on the last trial it called two witnesses who testified that it was six or seven miles per hour. There were some facts and circumstances proven, bearing on the question of speed, which could also have been considered by the jury, not the least important of which was the undisputed fact that, though the train was running upon a slippery track and a down grade, it was brought to a full stop within 100 feet of the point where the deceased attempted to get on. In this conflict of testimony the case went to the jury, and the verdict for the plaintiff must be taken by us as conclusively establishing the fact that the train was running at the rate of from one to two miles per hour. It is said that two of the plaintiffs' witnesses testified on the first trial to a greater rate of speed than upon the last trial. That, if true, was a circumstance for the consideration of the jury in determining what weight the testimony was entitled to, but it has no place in the consideration of this appeal. The only question that we have to deal with is whether the deceased, in attempting to board the train when going by the station platform at the rate of from one to two miles per hour, and having been invited by the conductor in charge of the train to "jump on," was guilty of negligence as matter of law. It was a regular station on defendant's road where its trains stopped, and where passengers got on and off. On this morning, however, it failed to stop. The plaintiffs' intestate was on the platform waiting for the train, which he intended to take as a passenger, and while so waiting for it to stop it proceeded slowly past the platform, and when the rear car, which was the only passenger-car on the train, had nearly reached the point where he was, the conductor, not intending to stop, invited him to get on, and he

Plaintiff not
guilty of neg-
ligence per
se.

attempted to do so, and was killed. It is not the province of this court to examine the evidence in order to form some theory as to the particular manner in which the deceased was killed. That was for the jury. We can only know from the findings below that the platform on which he stood was separated from the car into which he was invited by a space not more than six inches wide; that the iron railing on the part of the car through which he must pass was two feet and six inches wide, and the platform of the car which he attempted to reach was but two feet higher than the place where he stood. The attempt of a passenger to board a train going at a very low rate of speed in this manner, and under such circumstances, is not, in my opinion, such a reckless and dangerous act as to warrant any court in pronouncing it negligence *per se*. It is an act in regard to which reasonable and prudent men may differ, and therefore it is for the jury to determine its true character as a question of fact, under all the circumstances of the case. The true rule was stated by PECKHAM, J., in his opinion in this very case on the former appeal, in this language: "There may undoubtedly be circumstances under which an attempt to get on or off a moving train would not be regarded as negligence, as a matter of law, and where the question of negligence, under all the circumstances of the case, should be submitted to the jury." If this rule cannot properly be applied to a case like this, where the train, upon the finding of the jury, was barely in motion, it cannot have any practical application to any case whatever. If it is correct to say that a passenger, in attempting to board a train, moving at the rate of from one to two miles per hour, under the conditions and circumstances appearing in this case, is guilty of negligence as a matter of law, then the same result must follow in every case where the train is in motion at all. The act of alighting from a moving train is quite as dangerous as an attempt to board it while going at the same speed. The only difference is that there exists a stress of circumstances in the former case that does not exist in the latter. But the fact that there may be reasons for risking the danger in one case which do not exist in the other is not alone enough to change the question from one of fact to one of law. This court has held that a passenger who attempts to get off a slowly-moving train by the invitation of a servant of the company is not, as a matter of law, guilty of negligence. *Filer v. New York Cent. R. Co.*, 49 N. Y. 47. In that case the danger of getting off was as great and even greater than would be an attempt to get on while the motion of the train was the same. The passenger could have remained in the train, and suffered the inconvenience of being carried past her home, and in the case

at bar the deceased could have waited for another train; but surely this difference in the circumstances cannot change what was held to be a question of fact in the former case into a question of law in this. The highest court in at least three of our sister states has passed upon this question, and in each case it has been held to be one of fact. In *Johnson v. West Chester & P. R. Co.*, 70 Pa. St. 357, a passenger attempted to board a train moving at from three to four miles an hour. There was no invitation to enter the car. It was held that it was for the jury to say whether the danger of boarding the train when in motion was so apparent as to make it the duty of the passenger to desist from the attempt. Where the conductor failed to stop the train at the platform where passengers landed, and when the train was moving at from two to four miles an hour, he told a passenger to get off, who obeyed his direction, and was killed, it was held that this act was not in law negligence but was a question for the jury. *Lambeth v. Railroad Co.*, 66 N. Car. 494. In another case a young, vigorous man stepped down from a moving train. He had a valise in one hand and a basket in the other. There was no direction from any servant of the company. In an action to recover for injuries received, it was held that it was a question for the jury whether he exercised due care. *Railroad Co. v. Maugans*, 61 Md. 53. I think that the act of the deceased in attempting to board the train upon the invitation of the conductor, and under all the circumstances disclosed in this case, presented a question of fact for the jury, and not a question of law. The judgment in this case cannot be disturbed unless we are prepared to decide that the deceased was in law guilty of negligence in attempting to board the train in the manner and under the circumstances stated. The evidence of negligence on the part of the defendant is precisely the same now as when the case was here before. On that appeal Judge PECKHAM said: "It was the duty of the railroad company (having advertised so to do) to stop its trains at the station in question, and to give ample time to all persons desirous of getting on or leaving at that station to do so." And again, referring to the invitation of the conductor to get on the train, he said: "It may be assumed that this direction implied a notice to the deceased that the train would not stop at that station, and that unless he attempted to get on while the car was thus in motion he would be left at the station, and compelled to take another and a later train. It may be assumed that in giving this direction, and in failing to stop the train, the company was chargeable with negligence." The point that the trial judge submitted nothing to the jury except the evidence as to whether the conductor did or did not

invite the deceased to get on the train is utterly untenable. The jury were expressly charged to inquire upon the evidence whether the defendant failed to perform its duty to the deceased in not bringing the train to a stop, and, upon the question whether a safe opportunity was afforded to the defendant to get upon the train, they were to consider the evidence in regard to the invitation of the conductor. At the end of the charge the defendant's counsel requested the court to instruct the jury that, in case they found that the conductor did not invite the deceased to get aboard the train, their verdict must be for the defendant, as that ended the case, and this request was allowed. This did not withdraw from the jury the evidence bearing upon the failure of the defendant to stop, or any other question previously submitted, but was, in effect, an instruction that, although the defendant failed in its duty to stop the train at the station, yet there could be no recovery unless the conductor invited the deceased to get on. If there was any error in this part of the charge it was in favor of the defendant, and cannot now be used for the purpose of reversing the judgment. The judgment should be affirmed.

RUGER, C. J. and ANDREWS, J., concur.

Attempt to Board Moving Train—Contributory Negligence as a Matter of Law.—In *Bacon v. Delaware, L. & W. R. Co.* (Penn., May 27, 1891,) 21 Atl. Rep. 1002, it was held to be negligence as a matter of law for a passenger to attempt to get upon a train of cars while they are in motion. Accordingly where all the testimony on both sides shows that the passenger, for whose death the action is brought, was killed while attempting to get upon a moving train, it is proper to instruct the jury to find for the defendant.

Same—Failure to Stop at Station—Conductor Causing Train to Suddenly Accelerate its Speed while Passenger is Getting on.—In the case of *Montgomery & E. R. Co. v. Stewart*, (Ala. Dec. 27, 1890,) 8 So. Rep. 708, it was held that in an action against a railroad company for injuries sustained by a passenger while attempting to board a moving train, defendant is liable where it appears that the train instead of coming to a full stop at the station, as it should have done, merely slacked its speed to the rate of about two miles per hour; that while the train was moving at such rate the conductor cried "All aboard!" whereupon plaintiff attempted to board the train; and that, while plaintiff was in such position that any sudden and unexpected acceleration of speed involved great peril to him, the conductor with full knowledge of plaintiff's position caused the train to suddenly start forward, whereby plaintiff was injured,—though plaintiff may have been guilty of contributory negligence in attempting to board the moving train.

The court said: "Conceding, therefore, that plaintiff was negligent in attempting to board the moving train as is alleged in the first count, or in holding on to the railing of the steps and keeping pace with the train, as is alleged in the second count, yet, if the danger might have been avoided by due care on the part of defendant's employes, after they discovered the peril, or if, but for their affirmative act in negligently increasing the speed

of the train, knowing that thereby plaintiff's safety would be imperiled, as they must be holden to have known, the defendant company is liable notwithstanding plaintiff's own original negligence. 2 *Thomp. Tr.* § 1683; *Williams v. Northern Pac. R. Co.*, 3 *Dakota* 168, 11 *Am. & Eng. R. Cas.* 421; *Citizens St. R. Co. v. Steen*, 42 *Ark.* 321, 19 *Am. & Eng. R. Cas.* 30; *Romick v. Chicago, R. I. & P. R. Co.*, 62 *Iowa* 167, 15 *Am. & Eng. R. Cas.* 288; *Beems v. Chicago, etc., R. Co.*, 58 *Iowa* 150, 10 *Am. & Eng. R. Cas.* 658; *Kelly v. Union, R. & T. Co.*, 95 *Mo.* 279, 35 *Am. & Eng. R. Cas.* 306; *Hays v. Gainesville St. R. Co.*, 70 *Tex.* 602, 34 *Am. & Eng. R. Cas.* 97; *Indiana, B. & N. R. Co. v. Burdge*, 94 *Ind.* 46, 18 *Am. & Eng. R. Cas.* 192; *Frazer v. South & N. Ala. R. Co.*, 81 *Ala.* 185, 28 *Am. & Eng. R. Cas.* 565.

"Moreover, we are by no means prepared to say that on the case as presented by the first count of the complaint and supported by a tendency of the testimony, the plaintiff was guilty of contributory negligence at all. The test in this connection is not always found in the failure to exercise the best judgment, or use the wisest precautions; the influences which ordinarily govern human action are to be considered, and what would under some circumstances be a want of due care would not be such under others. *Lent v. New York Cent. & H. R. R. Co.*, 120 *N. Y.* 467, 44 *Am. & Eng. R. Cas.* 373. Indeed, we apprehend that it can in no case be said, as matter of law, to be negligence to get on or off a train moving at a rate of speed not in excess of two miles an hour, *Central R. & B. Co. v. Miles*, 88 *Ala.* 256, 41 *Am. & Eng. R. Cas.* 149, and this wholly irrespective of any invitation or direction to alight or board emanating from employes or deducible from circumstances. In this case, however, it is alleged, and the averment is supported by the testimony offered for the plaintiff, that the conductor, while the train was in motion, and to all appearances would not come to a full stop at all, instructed or directed the plaintiff to get on the cars by calling out to him, "All aboard." The danger of an attempt to board not being obvious, as we have said, the law is well, and has been long, settled that the plaintiff was in no wise negligent or lacking in due care to rely upon the assurance thus impliedly given by the employe, that it was safe to make the attempt to board in compliance with the direction of the conductor. 2 *Am. & Eng. Ency. Law*, 762; *Bucher v. New York Cent. & H. R. R. Co.*, 98 *N. Y.* 128, 21 *Am. & Eng. R. Cas.* 361; *Baltimore & O. R. Co. v. Leapley*, 65 *Md.* 571, 27 *Am. & Eng. R. Cas.* 167; *Lent v. New York Cent. & H. R. R. Co.*, 120 *N. Y.* 467, 44 *Am. & Eng. R. Cas.* 373; *Filer v. New York Cent. R. Co.*, 59 *N. Y.* 351; *Baltimore & O. R. Co. v. Kane*, 69 *Md.* 11; *Briggs v. Union St. R. Co.*, 148 *Mass.* 72, 37 *Am. & Eng. R. Cas.* 204; *Cincinnati, H. & I. R. Co. v. Carper*, 112 *Ind.* 26, 31 *Am. & Eng. R. Cas.* 36; *Central R. & B. Co. v. Miles*, 88 *Ala.* 256, 41 *Am. & Eng. R. Cas.* 149.

"But, aside from all this, the situation created by defendant's servants, as averred and as supported by the tendencies of the evidence, was in itself an invitation to those waiting at that station for the train to get aboard of it, and in the nature of an authoritative assurance that it was safe for them to do so. Confessedly the train ought to have stopped, was signaled to stop, recognized the signal, and slowed down to a speed of not exceeding two miles an hour in partial obedience to it. Confessedly, also, it did not stop, nor were any indications given of a purpose on the part of those in control of it to come to a full stop, but, on the contrary, a tendency of the evidence goes to show that no intention to fully stop was evinced or even entertained, and to all appearances the only opportunity meant to be afforded plaintiff to get on was such as he might enjoy from the maintenance, while passing the station, of the low rate of speed to which the train had been reduced. That a situation, so to speak, or an aspect of affairs, may be produced by trainmen, which will as fully import an invitation or

direction to action on the part of passengers as would oral instructions by employes, we do not doubt. *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, 27 Am. & Eng. R. Cas. 155. That, if the jury found the facts stated above, and which are alleged in the complaint, to exist, they would have been authorized to find further that an invitation to the plaintiff to board the train was involved in them, is equally clear. So finding, it follows as a matter of course, the danger not being obvious, that plaintiff was not negligent in making the attempt to get on the slowly moving train. Authorities *supra*. Moreover, if the facts referred to were found by the jury, they involved and served to impose another important duty upon defendant's employes, with respect to the knowledge they must have that no passenger is in a position of danger before accelerating the movement of the train. Ordinarily, the full duty of trainmen in that connection is performed when the train is brought to a standstill for a length of time which is reasonably sufficient to enable passengers to get on or off by the exercise of due care and diligence on their part; when this is done, there is no duty resting on employes to see and know that passengers desiring to alight have done so, or that persons desiring to take passage are safely on board. *Raben v. Central Iowa R. Co.*, 73 Iowa 579, 33 Am. & Eng. R. Cas. 520; *Straus v. Kansas City, St. J. & C. B. R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 384, and 86 Mo. 421, 27 Am. & Eng. R. Cas. 170; *Gulf, C. & S. F. R. Co. v. Williams*, 70 Tex. 159; *Pennsylvania R. Co. v. Peters*, 106 Pa. St. 206, 30 Am. & Eng. R. Cas. 607.

"Where, however, a reasonable opportunity is not afforded by holding the train stationary for passengers to get on and off, but they are invited and expected to do so while the train is moving at a low rate of speed, a different rule ought to, and in our opinion does, obtain. An invitation thus conveyed implies, at least, an assurance that the momentum will not be increased until all persons desiring to come aboard have done so, and imposes a correlative duty on those in charge of the train not to increase the speed without knowing that no person intending to act on the invitation is so situated as to be imperiled thereby. They cannot, in other words, acquit themselves by merely maintaining the slow movement sufficiently long for persons with diligence to get on, for this itself is a wrong, and as there is no obligation on the would be passenger to avail himself of such an invitation, though he may do so without negligence, they have no right to assume that he will avail himself of it immediately, or at all, in fact, but they must know that it has been acted on, and that there is no one in an exposed position when the increased motion is imparted to the train. And even were it conceded that the plaintiff was negligent notwithstanding the invitation or direction conveyed to him by the situation, because there was obvious danger in so doing, it was none the less the duty of defendant's employes to see that the *status quo* was maintained while the effort was being made, and the company would be liable for the consequences of their failure to do so, notwithstanding the prior negligence of the plaintiff. The evidence was conflicting as to whether the train was suddenly started off "with a jerk" while plaintiff was in the act of stepping upon the cars. There was no conflict, however, as to the points that conductor saw the plaintiff when the attempt was made, and that he then signaled the engineer to go forward. The jury may have found that that signal was obeyed, and the train made thereby to lurch suddenly forward, causing the injury complained of. We are not prepared to say but that they might have legitimately reached the further conclusion that the act of the conductor, done with a knowledge of plaintiff's position, was also done with a sense, on the part of the conductor, of the probable consequences of such sudden movement to the plaintiff, and unregardful of his safety. If so, this would be such gross negligence and recklessness on the part of the conductor as

would be the legal equivalent of that wantonness and intentional wrong doing which affords a predicate for the imposition of punitive or vindictive damages. *Alabama G. S. R. Co. v. Arnold*, 80 Ala. 600, 30 Am. & Eng. R. Cas. 546; *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 44 Am. & Eng. R. Cas. 441; *Louisville & N. R. Co. v. Watson*, 90 Ala. 68.

BROWNE

v.

RALEIGH & GASTON R. CO.

(*North Carolina Supreme Court, March 10, 1891.*)

Passengers—Freight Train—Place for Receiving Passengers other than Station—Reasonable Regulation.—It is not an unreasonable regulation of a railroad company to require passengers to be received upon a coach attached to a freight train, at some point other than the station or platform from which they usually enter, its passenger cars constituting a part of its passenger trains. Code N. Car. § 1963, recognizes the right of railroad companies to determine their places of receiving passengers.

Delay by Passenger in Getting on Train—Starting Train before Passenger has Boarded It.—The conductor of a freight train which had a passenger coach attached, and which, according to the regulation of the company, did not receive passengers at the platform devoted to passenger trains, directed a passenger to go to the coach and get in it. The conductor then signaled to the engineer to start the train, without waiting to see if the passenger was safely on board. The passenger had not yet got on when the train started, and in attempting to board it while it was in motion, received injuries for which he sued. *Held*, that the company was not liable, it appearing that the train had already been stopped a reasonable length of time, and that the passenger had willfully delayed to get upon it.

Contributory Negligence in Boarding Moving Train.—Where a passenger is injured while boarding a train in motion, he must, in order to avoid an imputation of contributory negligence, show that he did so without manifest risk and that the train did not stop long enough to allow him to get upon it.

THIS was a civil action, brought to recover damages for an injury received while getting on defendant's train, tried at the September term, 1890, of the superior court of Warren county, before WHITAKER, J. The following is the whole of the evidence:

Faulcon Browne, the plaintiff, as witness in his own behalf, testified as follows: "Was at Macon depot on or about the 25th of November, 1889. I purchased a ticket from Macon to Vaughan railroad station from Rodwell, agent of the defendant. In a few minutes the local freight came to Macon. Rodwell asked me if I was going off on that train, and I told him I was. He said to me that I had better get on; that the train would leave pretty soon. I asked Rodwell if it was not the duty of the company to pull the passenger coach to the

platform. The conductor, Lassiter, said, if I rode on that train at all, I would have to go where the passenger coach was then standing and get on, or I would be left. Then the conductor goes to the passenger coach, and waived his engineer to go ahead. When I reached the coach it was slowly moving. After stepping on the coach and having a good footing, the sudden jerk of the train, with the weight of a valise in my right hand, threw me off my balance, and caused my injury. I struck my leg against some part of the car step. The jerk of the train was caused by the engineer's putting on steam. I was incapacitated from my business for about five months. The wound was about the size of a silver dollar on the front of the right leg. Dr. Mark Perry attended me, and I had nurses besides my wife. I was then engaged in farming and merchandising, and my time was worth fifty dollars a month. I have not yet recovered from the wound. It still causes me dull, grinding pains through the wound, and sharp, shooting pains. The wound inflamed and discharged a half gallon, at least, of matter. This wound caused an abscess on the opposite side of the leg, which was painful and discharged matter, and particles of bone passed through this abscess. This healed over in about five months, but lacks a considerable of being well now. The scar has a bluish color. The ulcer on the back of the leg was the size of a half dollar. I am 35 years old; am married, with a family of six. I was at the time of the accident perfectly sober. Cross-Examined. I had ridden on that train occasionally before. I had taken about one ounce of whisky, or two drinks. I wrote Capt. Smith, superintendent of defendant, a letter about this accident. The witness identifies the letter, which is as follows: "Vaughan, N. C., Nov. 27th, 1889. William Smith, Esq., Superintendent R. & G. R. R., Raleigh, N. C.—Dear Sir: Your conductor treated me with the utmost of contempt at Macon, N. C., on the 26th inst. He refused to pull up his train for me to get on, and I had to jump it at the risk of my life, and hurt my leg badly in doing so. Please excuse me for writing, but I feel it my duty. I have been a patron of the road for twenty years; have furnished thousands of ties and hundreds of cords of wood, and am still patronizing the company; and yet I must be treated as a negro, after buying a ticket for my station, and asking your man to pull up for me. Very respectfully, [Signed] F. BROWNE. P. S. If he is not discharged, I will sue the company for damages. [Signed] F. BROWNE.' I had conversation with several parties, in which I said if the defendant company would discharge Lassiter, the conductor, I would not sue; but after I had knowledge of the extent of my injury I would

have sued if it had been my last breath. I went to see Doctor Perry once in eight or ten days, up to March court, 1890, and followed his prescriptions. I don't recollect Doctor Perry telling me if I didn't stop drinking whisky I could not get well. I don't think Doctor Perry did tell me to take rest. I walked about with the aid of a stick. The coach was barely moving. I didn't think there was any danger. I knew that if a man jumped on a moving train it was at the risk of his life."

Robert Fisher, a witness for the plaintiff, testified: "I was at Macon depot on the day the injury occurred. I saw the conductor, agent, and plaintiff, and heard conversation between depot agent and plaintiff. Rodwell, the agent, said to plaintiff, 'Are you going down on the train?' Plaintiff said, 'Yes.' Rodwell said, 'You had better be getting on, as it is going away.' Plaintiff said to Agent Rodwell that he thought that it was the duty of the company to pull the passenger coach up to the depot; that he did not feel disposed to walk fifty or a hundred yards to get on the coach in the mud. The conductor, being present, said to the plaintiff: 'If you are going on this train, you had better go ahead and get on. We are going away.' Plaintiff started up the track to the coach and when he was in two or three cars of the passenger coach the conductor waived the engineer ahead, and signaled him to go away. The conductor got on the train while it was moving. When the plaintiff got on the passenger coach the train had moved the length of two or three cars. The conductor got on the rear end of the coach, and he was not hurt. I saw the plaintiff at the time he stepped on the coach. The engine at this time gave a sudden jerk, and increased its speed. I saw plaintiff get on the train, and the train go to the next station. The passenger coach was 75 or 100 yards from the passenger station. I do not know whether or not the plaintiff was injured. I saw him next day at his home, about a mile from Vaughan station. I saw his leg. There was a skinned place on the front of it. I saw him after this every week, and sometimes two or three times a week. He was lame from the wound four or five months. During the five months following the day I saw plaintiff at Macon depot there was a sore on the front of his leg and one on the calf. The one on the calf of the leg was discharging matter. This was in March. His leg was paining him right much. I took off the bandage, and washed the wound, and a piece of bone came from it. The plaintiff was in bed. Cross-Examined. Don't know how many cars were in the train that day. The passenger platform and freight platform are on opposite sides of the track. I can't tell how far the passenger coach was from the passenger platform.

John Harris, a witness for the plaintiff, testified: "I was at Macon the day of the occurrence. Saw the conductor and the agent of the defendant company. Plaintiff told the conductor he wanted to go to Vaughan station on the freight. The conductor told the plaintiff that he was a little behind, and to go back and get on the coach. Plaintiff made for the coach. I did not see him get on the coach. The passenger coach was fifty or sixty yards from the passenger platform. It was a long train, the local freight." It was admitted that the train was a mixed one, with passenger coach attached.

Fred Yancey, a witness for the plaintiff, testified: "I was at Macon depot the time plaintiff was injured. I saw the plaintiff there, and heard the conductor tell the plaintiff if he was going it was time he was getting on the car. The plaintiff asked if the passenger coach was coming any nearer. The conductor told him, 'No.' The plaintiff went towards the passenger coach, but I did not see him get on. He had gotten within two or three car lengths of the passenger coach when the train began to move. Cross-Examination. I don't know who else was present when the conversation took place with the plaintiff."

Dr. P. J. Macon, a witness for the plaintiff, testified, (the witness was admitted to be an expert:) "I have heard the testimony of the witnesses as to the size, appearance, and duration of the injury to the plaintiff, and of the ulcer which appeared shortly after. On yesterday I made a personal examination of the plaintiff's wound. The present appearance is that about midway between the ankle and the knee there is a large purplish spot, the size of a dollar and a half. In the centre of this there is a red cicatricial tissue; cicatricial tissue forms after an ulcer. Directly opposite this I found another purplish spot, and near the center of this spot a point a little larger than a pea, with cicatricial tissue. This indicates a cured abscess or ulcer. Cicatricial tissue is not as good as skin. It is not as permanent, and under some circumstances might cause a permanent running sore, or *necrosis*. If the jury should find the facts to be that the injury on the front of plaintiff's leg was caused as stated by the witnesses of the plaintiff, and that in one month from the time of the first injury an ulcer appeared upon the calf of the plaintiff's leg opposite said injury, in my opinion the natural and proximate cause of the ulcer or abscess was the discharge of some foreign body, such as iron, cloth, wood, bone, or anything that could not be absorbed. A piece of dead detached bone will come to the surface, if possible. No detached bones in the leg. If the jury believe and find as a fact that the defendant, by its negligence, produced the wound on the leg

of the plaintiff which gave him great pain, discharged matter, rendered him unable to get out of his bed for several days, and physically unable to attend to his business for several months, and gives plaintiff a dull, grinding pain now though done in November, 1889, as to duration it may last a life time in a better or worse condition; as to extent, I don't know; and as to severity, that depends upon circumstances. If his health remained in a good condition, or if he does not receive other injuries to the affected part, I don't think it would amount to much; but if his health should fail, or he should have an attack of fever of any kind, I cannot tell the consequences or result. If the jury should find as a fact from the testimony that an ulcer appeared on plaintiff's leg within a month from the time of the injury, in my opinion the ulcer was caused by a dead bone. If the jury should find the facts to be as stated by the witnesses, the presence of dead bone would have been a natural and probable consequence of the injury. Cross-Examined. Cicatricial tissue is what the unlearned call a 'scar.' If the skin is severed in any way there is a scar. The scar on the back of plaintiff's leg could have been made by a boil. If there was foreign matter in the wound it would have exhibited itself in from four to six weeks. The plaintiff's health was not permanently injured, as appears to me from my examination today. It would take a splinter in the finger a day or two to fester,—only a short time,—depending on the distance it had to travel. The wound would not have healed with a foreign substance in it. Healing of the wound indicates absence of any foreign substance. Redirect. There is a muscle between the outside of the leg and the front part. If the bone was undergoing exfoliation, it would take longer for a splinter to fester. If there was exfoliation, the wound would not heal.

This was all the evidence for the plaintiff as to the manner in which the accident occurred. The plaintiff introduced several witnesses who testified that he was not drunk on the day the accident took place.

For the defendant, Dr. M. P. Perry, who was admitted to be an expert, testified: "I live at Macon. I attended the plaintiff some time in the latter part of November, 1889. The plaintiff called on me to treat his wound, which was about one half by two inches in size. It was not a fresh wound, and had granulated. I prescribed for it, and saw it again a month afterwards, and found it to be still a healthy, granulating wound, but it had healed none. I saw it again in about a month, and then it was improving some. I saw it again in about the same length of time, and it was still im-

proving. I saw it another time, and found it still improving, and discharged the patient on March 18th, as about well, telling him to let me know if anything should happen to it. I heard no more of it. I advised the plaintiff not to take whisky, but I don't know whether he did or not. There was no abscess or break down of tissue or ulcer anywhere except on the front part of the leg. Plaintiff informed me this morning that after I discharged him an abscess had formed on the back part of his leg, which had discharged a piece of bone. When I examined the wound four or five days after the accident the bone was not injured. While I was attending him there was no indication of foreign substance in the wound. If there had been, it would have shown itself in forty-eight hours. The injury was not one which would permanently affect his health and usefulness. Under proper treatment, it ought to have healed in a month. The plaintiff, contrary to my directions, continued to use his leg, and there was some cause for the wound not healing. Drinking to excess would retard healing. From all granulating wounds some pus or matter comes, and there was a little from this one. Cross-Examination. A wound curing by granulation indicates that the circulation is weak, and it does not necessarily indicate that the wound is deep. I did not probe the wound. The indications showed no broken bones. If there had been dead bone, it would have shown itself from November to March. If the jury find that an ulcer did form within a month, then the wound might have healed. I never made any statement as to this wound to Mitchell Pegram. I have not said to any one that this wound might be a permanent one."

J. W. Lassiter, a witness for the defendant, testified: "I am a conductor of the defendant. On November 25th last I was the conductor on the local freight train, which has a passenger coach attached. The passenger coach on the freight train is in the rear of the train. It does not stop at the passenger platform, as this would take four or five minutes at each depot, and there are nineteen depots on the road. I recollect the day on which the plaintiff claims to have been injured. The passenger coach was seven or eight car lengths from the platform. The train stopped at Macon that day not less than fifteen minutes. Just as soon as we load and unload the train we leave just as soon as possible, so as to make the schedule. It is a hard schedule to make. I did not swear at or use bad language to the plaintiff. When I hallooed, 'All right!' to the hands, my attention was called to the fact that a passenger was to go. The hands signaled the engineer ahead. I said to the passenger that we had been

there fifteen minutes; time enough to get aboard the train. He got up. I do not remember any other conversation with the passenger. I got on the front end of the car, the plaintiff on the rear end. The plaintiff was at the freight platform when I saw him. He said nothing to me of being injured. Cross-Examination. I told the plaintiff that I would not stop any more after starting. When I got on the train I felt no jerk more than common. I think that I can state positively the train did not jerk. To the best of my recollection it did not. I never saw posted any rule that passenger coach on the local freight would not stop at the passenger platform."

John E. Rodwell, a witness for the defendant, testified: "I am agent of the defendant at Macon, and have been since August, 1882. The passenger coach on the local freight train stops at no particular place. It does not pull up to the passenger platform for passengers to get on. I have sold tickets to the plaintiff to go as a passenger on the local freight train before the accident. I remember the day the plaintiff claims to have been injured. I saw there at the time Browne, J. L. Coleman, Lassiter, and the train hands. I did not see Mr. Fisher there. The train came there a little late, and after loading the train, which took some fifteen minutes, plaintiff said that he wanted to go on that train. The conductor said to plaintiff that if he wanted to go on that train he had better get on. The passage way between the point where plaintiff was and the passenger coach was in good condition. There were no obstructions in the way. Cross-Examined. I have frequently, prior to the time of the alleged accident, sold tickets to the plaintiff to travel on the local freight train. On these occasions I cannot state positively that the passenger coach did not pull up to the passenger platform. I had no conversation with the plaintiff. Redirect. If the passenger coach was ever at any time stopped at the passenger platform for the plaintiff, I have no recollection of it."

J. L. Coleman, a witness for the defendant, testified: "I am a merchant, and live at Macon. I remember the time that plaintiff says that he was hurt. I saw the plaintiff get on the train. It was moving as fast as an ordinary man would run. I did not see Robert Fisher there. I saw Rodwell, the conductor, the plaintiff, and the train hands. Plaintiff apparently got on the train very well. I did not see him stumble. Cross-Examination. I cannot swear that Fisher was not at Macon that day. I did not see him there, and if he had been there I think that I would have seen him. When plaintiff got on the train it was going at a right good rate of speed. He had his valise in his hand when he got on the train."

B. G. Riggan, a witness for the defendant, testified: "I

live at Macon, and my business is that of a liquor dealer. Recollect the day the plaintiff was said to have been hurt. I saw the plaintiff in my whisky shop on that day. He was drinking. I sold him two drinks, which he took, and two quarts of whisky. This was before the train left. Cross-Examination. I had taken a drink that day. He put the two quarts of whisky in his valise."

Richard Harris, a witness, for the defendant, testified: "I live at Macon, and am employed to pump water for the defendant. I saw the plaintiff on the day of the alleged accident. He came in the pump house where I was at work, and drank a half a pint of whisky at two drinks." There was evidence introduced for the plaintiff that he was not under the influence of liquor on that day.

The following prayers for instruction were, among others, submitted by defendant: (1) That there is no evidence of negligence, and the jury will answer the first issue, "No." This was refused, and the defendant excepted, and assigned the refusal as error. (2) That upon the whole evidence the plaintiff has contributed by his negligence to the injury, and the jury will answer the second question, "Yes." This was refused, and the defendant excepted, and assigned such refusal as error. (12) That if the jury believe from the evidence that the plaintiff was under the influence of liquor when the accident occurred, and for that reason was not as well able to provide for his safety, and that the accident would not have occurred had the plaintiff been entirely sober, then he has contributed to the injury, and the jury will answer the second issue, "Yes." This was not given in this form, and, as the defendant contends, not in substance, and the defendant excepted, and assigned the same as error. (13) That even if it had been the duty of the defendant to stop its trains at the platform, and although the jury should find that it failed in that duty, yet the plaintiff was not justified in attempting to board the moving train, but he should have remained at the station. That by attempting to board the moving train the plaintiff took all the risk of injury, and cannot recover in this action. This was refused, and the defendant excepted, and assigned the same as error. So much of the other instruction asked, and that given instead of it, as are material, will be found incorporated in the opinion of the court. There was a verdict for the plaintiff, and the defendant appealed.

Batchelor & Devereux, for appellant.

W. R. Henry, for appellee.

AVERY, J.—At the request of the defendant, the court instructed the jury that the failure and refusal of the conductor

Effect of failure to have coach at passenger platform.

to cause its passenger coach, attached to its freight train, to be drawn up to a point opposite the passenger platform, was not negligence. The plaintiff did not except, and it is insisted that the question whether it was a reasonable regulation to require passengers to get on board the train at a point so remote from the place used for passenger trains is now so far eliminated in the discussion of the defendant's appeal that it cannot be considered, even in determining whether, on the one hand, there was, as insisted by the defendant, no evidence of negligence on the part of its agents or servants, or whether, on the other, there was undisputed testimony showing that the proximate cause of the plaintiff's injury was his own contributory negligence. This case must be distinguished from *Rose v. Wilmington & W. R. Co.*, 106 N. Car. 168, and *Pickens v. Richmond & D. R. Co.*, 104 N. Car. 312, 40 Am. & Eng. R. Cas. 649, because the defendant company relies, among others, upon two exceptions, the consideration of either of which necessarily involves a review of all of the evidence tending to show negligence on the part of the defendant company. We cannot determine whether there was any evidence of negligence on the part of the defendant, and eliminate from the discussion the question whether, in the exercise of ordinary care, the passenger coach should have been drawn up to the platform, because the plaintiff contends that the court should have instructed the jury that the defendant was negligent in failing to give passengers an opportunity to get on at the platform. In passing upon the other exception, also, it is insisted for the plaintiff that, though it may have appeared that he was negligent in waiting till the train was in motion before attempting to get on it, still the injury would have been avoided if the passenger coach had been stopped at the station. *Deans v. Wilmington & W. R. Co.*, 107 N. Car. —, 45 Am. & Eng. R. Cas. 45. In both of the cases mentioned, the exceptions considered were addressed to questions growing out of particular portions of the testimony, not to the whole of it, and raised only the point whether there was undue force used in expelling a passenger.

It was not an unreasonable regulation of the company to require passengers to be received upon a coach attached to a freight train at some point other than the station or platform, from which they usually enter its passenger cars, constituting a part of its passenger trains; but the space or route ordinarily traversed from the office, where the ticket is procured, to the place appointed for embarking, should be kept in safe condition for transit, and passengers have a right to act upon the presumption that such way may be traversed

without danger due to its defects. 2 Wood, Ry. Law, p. 1128, § 305; *Hulbert v. New York Cent. R. Co.*, 40 N. Y. 145; *Green v. Erie R. Co.*, 11 Hun (N. Y.), 333. Our statute (Code, § 1963) is, in so far as it affects this question, an affirmation of the general principle, as it requires railroad companies to run their trains of cars for the transportation of passengers and property at regular times, to be fixed by public notice, and carry such passengers as shall be offered, "within a reasonable time," at "the place of starting, the junctions of other roads, and the usual stopping places established for receiving and discharging way passengers and freights for that train." In the plainest terms, the law recognizes the right of the companies to determine their places of receiving and discharging passengers for each train, subject only to the proviso attached by law, to which we have adverted. If the plaintiff's injury was not caused by the failure of the defendant to use ordinary care in looking after the condition of the way from the ticket office to the cars, it incurred no liability by refusing to receive the plaintiff at the platform.

The general rule is that passengers who are injured while attempting to get on or off a moving train cannot recover for the injury. *Phillips v. Rensselaer & S. R. Co.*, 49 N. Y. 177; 2 Beach, Ry. Law, § 987. But of course this, like all other general rules, is subject to some exceptions. Where a train is stopped at a station, and, after passengers are told to go aboard, it is suddenly started before they have had time to do so, and when, without unreasonable delay, they are trying to get upon it, if a passenger who is in the act of getting upon the platform is injured by the sudden jerk of starting, without a signal, the court may submit the question of negligence to the jury. But the company is under no obligation to delay the departure of the train beyond the usual time, because a passenger has purposely or negligently deferred getting on it till the last moment, though he has had abundant time to do so while it was standing still. *Thomp. Carr.* p. 225, § 16. In running its trains, the officers of a company ought always to be mindful of the fact that, in order to insure the safety and subserve the interests of its patrons, and accomplish the ends for which it was created, the corporation must move its trains, as far as possible, regularly and systematically. Hence the statute, which we have already cited, affirms another common-law principle in limiting the obligation to receive passengers to those who are offered or offer themselves within reasonable time.

The company would, in any event, be liable for an injury

Effect of
plaintiff's de-
lay in getting
on train.

wantonly or purposely inflicted by its officers. If the conductor saw the plaintiff approaching the train at his suggestion or invitation, and purposely gave the signal to move, when he was in the act of ascending the steps of the platform, the company was liable for any injury sustained by the latter. But when the train had been stopped for the usual time, unless the number of passengers who debarked or embarked at the station was so great as to require a longer stop in order to insure the safety of its patrons, the conductor, though he had told a dilatory passenger that he must get on at a certain point, was not bound, in order to relieve the company of liability, to look after his movements, and refrain from giving the signal to the engineer to move, until assured that he was seated on board the train.

A portion of the instruction that the defendant prayed the court to give was as follows: "(3) That if the jury shall be-

Instructions
asked and
given.

lieve that the cars of the defendant stopped at the station long enough for the plaintiff to have gotten on board while they were stationary, and that the passage way from the depot building to the car was open and safe, and that instead of getting on the car the plaintiff loitered around the station until the cars were in motion, and then attempted to get on them while the train was going as fast or faster than a man could walk, then he has contributed to his injury, and the jury will answer the second issue, 'Yes.'" This was not given in this form, and the defendant excepted, because it contends that it was not substantially given, and assigns the same as error. "(4) That while getting on a moving train is not negligent under all circumstances, yet the plaintiff must show that, under the circumstances, it did not appear dangerous, and must also show some good reason for doing so, and for not getting on the train while it was stationary." This was refused, and the defendant excepted, and assigned the same as error. "(5) That there is no evidence in this case of such facts and circumstances as would warrant the plaintiff in getting on the moving train." This was refused, and the defendant excepted, and assigned such refusal as error.

In lieu of the charge asked, the judge instructed the jury as follows: "If you should find from the evidence that the conductor of this train was told by the plaintiff that he wished to go on that train, and that, upon being so told by the plaintiff, he, the conductor, told him to go and get upon the passenger coach; that thereupon the plaintiff proceeded to do as directed, but before he could get to and on the coach the conductor signaled the engineer to go ahead, and the train was thus put in motion before the plaintiff could get on

the coach, and the plaintiff was injured in the attempt to get on,—then the defendant would be guilty of negligence. (To this charge the defendant excepted, and assigned the same for error.) It was the duty of the defendant to stop its train at the depot a sufficient time to enable passengers to get on its passenger coach, but, if the defendant's train had already been at the depot a sufficient time for this purpose, it was not under any legal obligation to remain any longer for this purpose, although passengers might arrive and give notice of an intention to get on board. If you should find that the defendant's train, having been at Macon depot a sufficient time to take on passengers, upon the plaintiff's notifying the conductor that he desired to take passage on this train, the conductor told him that he would not delay or stop the train, and thereupon gave the signal for the train to move, then, nothing else appearing, the defendant would not be guilty of negligence. If you should find from the evidence that the plaintiff got on the coach under the direction of the conductor, and after getting on the platform of the coach was injured by a sudden and unusual jerking, then the defendant would be guilty of negligence. (To this charge the defendant excepted, and assigned the same as error.) If you find from the evidence that the conductor directed the plaintiff to get on the moving train, then, if the plaintiff was injured in obeying such instructions, the defendant was guilty of negligence. (To this instruction the defendant excepted, and assigned the same as error.) If the jury should find that the plaintiff was injured while attempting to get on a moving train, then the plaintiff is guilty of contributory negligence, unless the jury shall find that the conductor of the defendant directed him to do so, or unless they shall find that there was no such apparent danger as would prevent a prudent and sensible man from so attempting to get on. (To the qualifications to this charge the defendant excepted and assigned the same as error.)"

We think that there was error in the failure of the court, in response to the request of the defendant, to present clearly to the jury the well established principle that, after holding the train long enough to disembark and receive passengers, the conductor was not bound to look to the safety of the plaintiff, (though he may have told him he ought to get on,) and to delay giving the signal till he saw the plaintiff enter the coach. The company would have been liable unquestionably if the invitation of the conductor to get on the train had been extended when the train was already in motion, instead of before giving the signal to leave at the usual time. It is equally

Plaintiff's
negligence
defeats re-
covery.

clear that the jury might have been misled by the statement of the law in reference to contributory negligence by the court. The judge should have told them, as requested, that the fact of getting on a moving train was, as a general rule, evidence of contributory negligence, and that proposition should have been stated without qualification other than such as was manifestly suggested by and applicable to the evidence in the case at bar. 2 Beach, Ry. Law, § 987; 2 Wood, Ry. Law, 1154; Whart. Neg. § 369. From the plaintiff's own testimony it appears that he was first warned by Rodwell, the defendant's agent, to get on the train, and notified that it would leave soon, but, instead of acting on the suggestion of the agent, he manifested a disposition to stand upon his supposed legal rights. The conductor, Lassiter, then said, according to plaintiff's own statement, that, if he "rode on that train, he would have to go where the passenger coach was then standing." This language could not be fairly construed as a command to get on the train, but it was simply a warning that he must comply with the regulation "if he rode on that train." The plaintiff was *prima facie* negligent in getting upon a moving train, and, in order to relieve himself of the *onus* placed upon him, ought to have shown either that he went in obedience to an unequivocal invitation or command to get upon a train not standing still, but already in motion, and in obeying the order, or accepting the invitation, he did not expose himself to manifest danger, or that the conductor did not stop at the station a sufficient time to allow passengers to get on and off. Whart. Neg. § 369. After admitting that he got upon a moving train, the burden was upon the plaintiff to bring himself under some exception to the general rule that such conduct is contributory negligence, and will be deemed the proximate cause of any injury received in doing so. Malcom v. Richmond & D. R. Co., 106 N. Car. 63, 44 Am. & Eng. R. Cas. 379; 2 Wood, Ry. Law, p. 1126. § 305; 2 Beach, Ry. Law, *supra*; Chambers v. Western N. Car. R. Co., 91 N. Car. 471; Smith v. Richmond & D. R. Co., 99 N. Car. 241, 34 Am. & Eng. R. Cas. 557.

Upon the plaintiff's own testimony, or upon a review of the whole testimony, there is no such evidence of a command as to warrant the charge given by the court, or to go to the jury as tending to show that the injury was not caused by the plaintiff's own negligence in getting upon the train while in motion. There is no testimony tending to show that, by the exercise of ordinary care, the defendant could have prevented or avoided the injury. If it were necessary, we might rest our ruling upon the additional ground that the

instruction given to the jury in reference to the question whether the plaintiff's injury was proximately caused by intoxication, and consequent inability to get upon the car with his valise in hand, was not fully responsive to the request of defendant. But it is unnecessary to discuss that question, as it is to advert to the exception that there was no evidence to warrant the charge predicated upon the ground that the injury might have been caused by an "unusual jerk" in starting the train. There was error for which a new trial must be granted.

DEWALD

v.

KANSAS CITY, FORT SCOTT & GULF R. CO.

(44 Kansas, 586.)

Negligence—Question of Law and Fact.—Where the facts are disputed, negligence is a question of fact for the jury, but where the facts are undisputed, and only one inference or deduction is to be drawn from them, it presents a question of law for the courts.

Action for Death—Contributory Negligence Shown by Plaintiff's Testimony—Prima Facie Case.—Where an action is brought under the statute to recover damages for the benefit of the next of kin of a deceased person, and the plaintiff's testimony shows that the negligence of the deceased contributed directly to his death, the plaintiff has failed to make out a *prima facie* right of recovery, and a demurrer interposed to the evidence should be sustained. .

Presumption of Ordinary Care—When Overthrown.—A jury may infer ordinary care and diligence on the part of an injured person from the love of life, or the instinct of self preservation, and the known disposition of men to avoid injury, but this presumption is overthrown when there is direct proof to the contrary.

Passenger Alighting from Moving Train—Contributory Negligence.—Where a passenger, without looking or listening for an approaching train, leaves his train voluntarily before it is stopped at its station, and before it is time for the train to stop, and the train is running at the rate of six miles an hour when he gets off, and he is then run against by an engine following his train on a parallel track, and receives injuries resulting in his death, the passenger contributes directly to the injuries causing his death.

ERROR from Wyandotte District Court.

Sherry & Hughes, for plaintiff in error.

Wallace Pratt, Charles W. Blair, and Frank Hagerman, for defendant in error.

HORTON, C. J.—This was an action brought by Mary A. Dewald, as administratrix of the estate of Edward Dewald, deceased, against the Kansas City, Fort Scott & Gulf Railroad Company, to recover damages alleged to have resulted from the negligence of the defendant

Case stated.

in wrongfully causing the death of the deceased. The action was brought under the statute to recover damages for the benefit of the next of kin. The petition alleged as negligence that the plaintiff's intestate was a passenger for hire, whom the defendant had, for such hire, agreed to carry from Kansas City to Rosedale; that the car in which plaintiff's intestate rode was stopped at a point in Rosedale for the purpose of letting its passengers alight therefrom; that, while alighting, the deceased was run against and killed by an engine which had been cut from the car, and was following the car on a parallel track. The case came on for trial before the court with a jury. After all the evidence was introduced on the part of the plaintiff, the railroad company interposed a demurrer on the ground that no cause of action had been proved. The demurrer was sustained by the court, and judgment rendered in favor of the company, and against the plaintiff for costs, to which ruling and judgment the plaintiff excepted, and filed a motion for a new trial, which motion was overruled, to which ruling of the court the plaintiff also excepted, and brings the case to this court for review.

The evidence offered by the plaintiff tended to show that the railroad company ran an accommodation train between Kansas City and Rosedale. This train consisted of an engine, tender, and coach. Kansas City was north of Rosedale. At Rosedale there was a depot, located in the southern part of the town, called "Depot Rosedale." When the train came from Kansas City in the evening it would be heading to the south, drawing the tender and coach after it. It would proceed on its journey till it reached the depot, then designated on the plat as "Depot Rosedale," which was as far south as that train went. It was customary for people residing at Rosedale, in the vicinity of the "coal shed," instead of leaving the train when it reached the south depot, to remain on the coach until it was taken back and set out on the sidetrack near that shed, when they would leave the train, and go to their homes. In this way they would save themselves some distance in walking. For doing so they paid no fare. On the train returning to Kansas City, the engine and tender would be transferred to the north end of the coach, and then would back to Kansas City, drawing the coach after it, so that in making the return trip the tender would come first, the engine next, and then the coach. The through passenger train passed a little before the time this accommodation left for Kansas City, and it became necessary to place the latter on the side track so that the main track would be open for the passage of the through train. There being no turn-table at Rosedale, the work of putting the engine and tender on

the north end of the coach, and at the same time placing the train on the side track so as to leave the main track open, was done thus: The engine, after disposing of the business at Rosedale, would back the train from the depot towards the north till it reached the vicinity of the opening of a side track. Here there was a down grade towards the north. The engine and tender would be uncoupled from the coach, and the latter pushed or kicked ahead. The switch being thrown, the coach would pass upon and down the side track, and, after the coach reached the side track, the switch was turned back, and the engine would back towards the north on the main track. The coach would be stopped near the north end of the track, at about the coal shed. The engine would back north on the main track, and, when it had passed the switch at the north end of the side track, near the "cattle guard," that switch would be opened, and the engine would then go in on the side track and be coupled to the coach, which would be found standing, as stated, near the coal shed. Here the train would stand till the through train passed, and then it would move towards the north to and on the main track to Kansas City. The evidence offered by the plaintiff tended to show further that on the evening of April 7, 1886, Edward Dewald, the deceased, returning from Kansas City upon the accommodation train to Rosedale, did not leave the train when it reached the Rosedale depot, but remained in the car as it was being taken back to be set out on the side track. In this way, he undoubtedly expected to save himself some distance in reaching his home. While the car was in motion, going about six miles an hour, he went to the south end of it, and got off from its west side upon the main track. The car from which he stepped off was about 15 car lengths from the place where it usually stopped on the side track. In getting off the car he was struck by the tender moving northward, and received injuries resulting in his death. Upon this state of facts, established by the evidence offered upon the part of the plaintiff, the trial court committed no error in sustaining the demurrer to the evidence, which was interposed by the railroad company.

Where the facts are disputed, negligence is a question of fact for the jury, but where the facts are undisputed, and only one deduction is to be drawn from them, it presents a question of law for the courts. *Kansas Pac. R. Co. v. Butts*, 7 Kan. 208; *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 37. In this case, the facts are undisputed. The negligence alleged in the petition was not proved. The car had not stopped when Dewald stepped off, and when he stepped off it was not at the Rosedale depot,

Negligence—
Question of
law and fact.

nor at the place at the north end of the side track, where it was usual for the car to stop when taken back from the depot and set out on the side track. There is no evidence tending to show that the railroad company, or any of its agents, purposely or wantonly injured the deceased. As the car had not stopped when the deceased got off, no negligence can be imputed against the railroad company, or its agents, in running the engine and tender on the track parallel with the one the passenger car was on, as to the persons in that car, because it could not have been anticipated that any person in the car would be so careless or reckless as to jump off while it was moving quite rapidly, and before it reached its usual stopping place. Again, it appears from the evidence that but for the deceased's own negligence

Company not negligent.
Deceased guilty of negligence in leaving train.

he would not have been injured. He left the car when it was moving quite rapidly, and could not have listened or looked for the approaching engine. Under such circumstances as are disclosed in this case, a passenger cannot voluntarily jump off of a moving car, thereby placing his life and limbs in peril, and then claim to be free from fault. *Parsons v. New York Cent. & H. R. R. Co.*, 37 Hun (N. Y.), 128; *Com. v. Boston & M. R. Co.*, 129 Mass. 500, 1 Am. & Eng. R. Cas. 457; *Weber v. Kansas City, C. R. Co.*, 100 Mo. 194, 41 Am. & Eng. R. Cas. 117; *Burrows v. Erie R. Co.*, 63 N. Y. 556; 2 *Shear. & R. Neg.* (4th Ed.), note 1, p. 359; *Reibel v. Cincinnati, I. St. L. & C. R. Co.*, 114 Ind. 476; *Beach, Contrib. Neg.* p. 156, § 53; *Patt. Ry. Acc. Law*, §§ 22, 24, 259; 2 *Shear. & R. Neg.* (4th Ed.) § 525; *Union Pac. R. Co. v. Adams*, 33 Kan. 427, 19 Am. & Eng. R. Cas. 476; *Clark v. Missouri Pac. R. Co.*, 35 Kan. 350; *Atchinson, T. & S. F. R. Co. v. Townsend*, 39 Kan. 115, 35 Am. & Eng. R. Cas. 352. If the deceased had been directed by the conductor, or any person in charge of the train, to jump off, or if the car had not stopped at the regular station for passengers to alight, many of the questions argued in the briefs would be before us for consideration; but, upon the facts presented, many of the authorities cited by plaintiff are not applicable. It is urged, however, that the case ought not to have been taken from the jury, because the

Presumption of ordinary care.

presumption is that the deceased, at the time he was injured, was in the exercise of due care. It is true that a jury may infer ordinary care and diligence on the part of an injured person from the love of life, or the instinct of self-preservation; and the known disposition of men to avoid injury; but in this case the presumption that the deceased was in the exercise of due care is overcome by proof to the contrary, and this appears without any conflict of evidence from the plaintiff's own case.

Where an action is brought to recover for personal injuries, and the plaintiff's testimony shows that his own negligence contributed directly to the injury, he has failed to make out a *prima facie* right of recovery, and a demurrer interposed to this evidence should be sustained. *Gibson v. City of Wyandotte*, 20 Kan. 158; *Williams v. Atchison, T. & S. F. R. Co.*, 22 Kan. 117; *Artman v. Kansas Cent. R. Co.*, *Id.* 296. A failure to listen or look, when by taking this precaution the injury might have been avoided, is negligence that will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signals contributed to the injury. *Leavenworth, L. & G. R. Co. v. Rice*, 10 Kan. 426; *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 37; *Mason v. Missouri Pac. R. Co.*, 27 Kan. 83, 6 Am. & Eng. R. Cas. 1; *Corlett v. City of Leavenworth*, *Id.* 673; *Maultby v. City of Leavenworth*, 28 Kan. 748; *Clark v. Missouri Pac. R. Co.*, 35 Kan. 353; *Wichita & W. R. Co. v. Davis*, 37 Kan. 748, 32 Am. & Eng. R. Cas. 65; *Union Pac. R. Co. v. Adams*, 33 Kan. 427, 19 Am. & Eng. R. Cas. 376.

Plaintiff to
make out
prima facie
case.

Upon the oral argument it was insisted by counsel for the plaintiff that the evidence was conflicting as to whether the train was moving or not when the deceased jumped off, and, therefore, the trial court erred in not submitting it to the jury. We have carefully examined the record, but do not so understand the evidence introduced. Two witnesses only were called to

Conflicting
evidence—
Question for
jury.

prove the alleged negligence of the railroad company. One of these, J. L. Worthy, testified that "the deceased stepped off of the hind end of the coach, at the west side, just as the engine was coming along, and it struck him, and gave him his injuries from which he died." "Question. State whether or not the car you were on was moving at the time you were getting off? Answer. I don't think it was, but I could not positively state. Q. You don't think it was? A. No, sir, I don't think it was moving. I think the car was standing still, although I would not be positive about that. Q. Which side did you get off on? A. I got off on the west side. Q. The same side as Dewald? A. Yes, sir. Q. Did you get off before or after this man? A. After. Q. You said that you could not tell whether this coach was in motion at the time this man got off? A. No, sir. Q. You did not know about that? A. No, sir." This witness did not testify, or intend to testify, that the car was stopped at the time that the deceased stepped off. The other witness, H. D. Trickey, testified: "Question. Were you near him [Dewald] at the time he sustained the injuries of which he died? Answer. Yes, sir. Q. Did you see him on that day? A. I saw him on the train. Q. Did you see Mr. Dewald the evening

when he got off the car? A. I did not see him when he got off. Q. Where were you, on the car when you saw him? A. No, sir. Q. I will ask you if you saw him struck by the engine? A. No, sir. I did not. Q. Where was he when you first saw him off the car? A. He was lying on his face, with his head nearly between two ties, close to the rail, quite close,—six inches, or thereabouts. Q. There wasn't any road crossing where he was picked up? A. No. Q. How far was it from where he was picked up to where the coach usually stood when the engine was hooked onto it in reversing? A. It must be something in the vicinity of, perhaps, half-way on the switch. Q. Half-way from the north switch? A. I couldn't say exactly, but somewhere in the vicinity of half-way; perhaps a little further north. Q. What I mean is, how far was it from where he was picked up down to where the coach usually stood when it was hitched onto the engine? A. It might be fifteen car-lengths. Q. Then the coach at that time—at the time he was picked up—had not got down to the place where it usually stood? A. No, sir. Q. You had not attempted to get off the coach yet? A. Not quite, when he had. I was getting off here in order to get around the end of the rolling mill. Q. Had he got down off of the car before you came out on the platform? A. I couldn't say. I didn't notice him on the platform at all. Q. Had the coach yet stopped before you got off? A. No. It hadn't. Q. You got off when it was in motion? A. Yes, sir. Q. And how soon after you got off before you saw Dewald lying there? A. I might have gone somewhere in the vicinity of two rods before I saw him, because I was running with the train. Q. You got off when it was in motion, and was running with it? A. Yes, sir. You say you ran how far? A. Possibly it might have been two rods. I heard some one holler there was a man hurt. Q. How far back did you go to where Dewald was? A. Well, I don't hardly think it was two rods, though it might be. Q. You did not mean to say you were standing on the rear platform, and saw the engine coming towards you, to see how fast it was coming? A. When I jumped off I saw the engine, and the engine was ahead. Q. It was passing the coach there? A. Yes, sir; passing the coach there, judging that I might be travelling at the rate of the car,—six miles an hour. As soon as I struck the ground I commenced to stop." The unavoidable conclusion, from the evidence of Trickey, is that he got off the train while it was in motion; that he got off after, or about the time, Dewald jumped off; and that when he, Trickey, got off, the car was going about six miles an hour. It must have been going six miles an hour when Dewald jumped off. To have sustained the allegations

in the petition, the evidence must have shown that the car upon which the deceased was riding had stopped when he jumped or got off; also that the car had stopped at a point in the city of Rosedale for the purpose of letting the passengers thereon alight; and, further, the evidence must have shown that the railroad company, or its agents, carelessly or negligently ran the tender or engine against the deceased. All of this was not established. The judgment of the district court must be affirmed. All the justices concurring.

Contributory Negligence of Passengers in Alighting from Moving Trains.—See *Wheian v. Georgia Midland & Gulf R. Co.* (Ga.), 44 Am. & Eng. R. Cas. 335, note 336.

Custom of Train to Slow up at Station—Failure to Slacken Speed.—In *Brown v. Chicago, M. & St. P. R. Co.* (Wis. Sept. 29, 1891), 49 N. W. Rep. 807, it appeared that a passenger on a freight train wished to get off at a station where the train was accustomed to slowing up, so that passengers could alight without danger. On this occasion the train did not slacken speed at the station, and shortly after passing it the passenger jumped therefrom, and received injuries which caused his death. *Held*, in an action by his administratrix, that deceased's contributory negligence would defeat a recovery.

Starting Train Before Passenger has Time to Alight.—In *Leggett v. Western New York & P. R. Co.* (Pa. May 27, 1891), 21 Atl. Rep. 996, it was held that a railroad company is guilty of negligence, and liable for injuries received by a female passenger, where it appears that she started to leave the car as soon as the train stopped at her station, but when she reached the platform found that the train was moving and fell off and was injured. It appeared that the brakeman who should have been at the platform assisting passengers to alight, had run forward to give the signal to start. It was held that it was proper for the trial court to charge the jury that while it is negligence *per se* for a passenger to alight from a moving train, yet, if the defendant did not stop its train at the station a sufficient time to enable plaintiff to alight with safety, and she left the car with reasonable expedition and care, and did not discover that the train was in motion until she came to the steps of the platform, and was descending them, then her position of danger was one occasioned by the negligence of defendant; and if the danger was so sudden that she had no time to deliberate and choose between the danger of remaining on and stepping off, and under all the circumstances she acted according to her best judgment, then she is free from fault.

Passenger Alighting after Station is Called and Car Door Opened—Stopping Place Unlighted.—In *England v. Boston & M. R. Co.* (Mass. Apr. 8, 1891), 27 N. E. Rep. 1, the action was brought for injuries sustained in alighting from a train and before it stopped. It appeared that the night was "so dark that a person couldn't see where he or she was going." Defendant's brakeman called the station, and fastened open the car door. The cars were lighted, and at the station platform, which the train was passing, there was a lighted lamp. Plaintiff had ridden frequently over the road, and the place where she attempted to alight and was injured was near the usual stopping place, but unlighted. *Held*, that plaintiff could not recover, from want of due care on her part. The calling of the station and opening and fastening back of the car door by defendant's brakeman was not an invitation to plaintiff to step off a moving train. Failure of brakeman to warn plaintiff did not amount to an assurance on the part of

defendant that it was safe to alight before the cars stopped. The fact that passengers were coming out of the rear door of the car, as if about to alight, did not show that plaintiff in stepping from the moving cars exercised due care.

Jumping from Wild Car Running down Grade.—In *Western Maryland R. Co. v. Herold* (Md. June 17, 1891), 22 Atl. Rep. 323, it was held that whether or not it is negligence for a passenger to jump from a car running down grade at the rate of ten miles an hour, and which had been started while no one was in charge of it by a boy loosening the brakes, was a question of fact for the jury.

Failure of Train to Stop.—In *Little Rock & Fort Smith R. Co. v. Tankersly* (Ark. Dec. 6, 1890), 14 S. W. Rep. 1099, it was held that the mere failure of a train to stop at a station, does not justify a hazardous attempt by a passenger destined for that station, to alight. And an instruction which implies that such failure charged the defendant with negligence and excused the plaintiff, is erroneous.

Boy Jumping from Train to Avoid being Carried Past Destination.—In *Avey v. Galveston, H. & S. A. R. Co.* (Tex. June 2, 1891), 16 S. W. Rep. 1015, the action was brought for injury to a boy ten years old. The petition alleged that the boy made a contract with the company to carry him to a certain flag station, where he lived; that on the train's approach to said station it was signaled to stop; that the company negligently disregarded such signal, and did not stop the train; that the boy, being frightened and confused by being so carried past the station, jumped from the train and was thus injured. *Held*, that the petition did not show on its face that the boy was guilty of contributory negligence, since whether the mind of a boy of that age is mature enough to make him responsible is a question for the jury.

The court said: "The appellee contends that the petition shows that the minor had arrived at years of discretion sufficient to make the alleged contract with the conductor, and knew of the movements of the train, and therefore he would be responsible for his contributory negligence in jumping from the train. Whether the mind of a boy 10 years old is sufficiently mature to make him responsible for his own contributory negligence is a question of fact for the jury, and should not be decided by the court on demurrer to the petition. *Texas & N. O. R. Co. v. White*, 57 Tex. 129; *Houston & T. C. R. Co. v. Boozer*, 70 Tex. 530, 34 Am. & Eng. R. Cas. 63. We are not prepared to say that the facts alleged in the petition in this case, admitting sufficient intelligence on the part of the boy to engage for his passage on the train, and to know of the movements of the train, would authorize the court to take the case from the jury. The case should have been submitted to the jury. There is nothing in the objection to the petition that gross negligence was not alleged; death did not result from the injuries; the suit is for the benefit of the injured party, and not for the parent. It is said by the appellee that the petition does not show that the servants of the company were, at the time of the accident, in a position to have prevented the boy from jumping from the train. This is true. But the failure of the conductor in the performance of a duty owing to the child, his misconduct in refusing to stop the train to enable the child to get off at his home, without danger, is the negligence complained of. The agreement and the signal created the obligation. The child was compelled to jump from the train or be carried away from home. If it exposed itself to danger by so doing, and so contributed to its injuries, but was not of sufficient intelligence to be responsible for its acts, the company would be liable for the consequences. The circumstances under which the injuries occurred are sufficiently set out in the petition, and the negligence or reckless misconduct of the company's servants is clearly averred. *Hull v. East*

Line & R. R. Co., 66 Tex. 619, 28 Am. & Eng. R. Cas. 221; Texas & P. R. Co. v. Cole, 66 Tex. 562, 27 Am. & Eng. R. Cas. 144; Gulf, C. & S. F. R. Co. v. McGown, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274. It was error to sustain the general demurrer to the petition, for which the judgment should be reversed, and the cause remanded."

Same—Action by Parents—Negligence in the Care of Child.—In *Avey v. Galveston, H. & S. A. R. Co.* (Tex. June 16, 1891), 17 S. W. Rep. 31, the plaintiff sued to recover damages resulting from physical and mental injuries, inflicted by the defendant upon plaintiff's son, a boy ten years of age. Plaintiff's petition alleged that the boy was sent by his mother on an errand 2 miles away; that when about to return home, he saw a train on defendant's road, which he knew would stop at the station where he lived, whereupon, without the knowledge of his parents, he applied to the conductor of such train for passage, and that the conductor, then and there acting for defendant, agreed to carry the boy to such station, and to stop the train so as to permit him to get off; that on the train's approach to such station it was signaled to stop, but that the company negligently failed to stop it; that the boy, being frightened and confused by being carried past the station, jumped from the train, and was injured. *Held*, that the petition did not show contributory negligence on the part of the parents in permitting the boy to place himself in such position.

Passenger Failing to Alight when Train Stopped, but Getting off after it Started.—In *Little Rock & Fort Smith R. Co. v. Tankersly* (Ark. Dec. 6, 1890), 14 S. W. Rep. 1099, which was an action by the plaintiff, a passenger on defendant's train, to recover damages for injuries received while endeavoring to alight therefrom at a station while the cars were in motion, it was held that the court properly instructed the jury that the defendant would not be liable, if, after the station was called, the train stopped long enough to afford plaintiff an opportunity, by the use of ordinary diligence, to alight from it while stationary.

Facts to be Considered in Determining Contributing Negligence.—In *Little Rock & Fort Smith R. Co. v. Tankersly* (Ark. Dec. 6, 1890), 14 S. W. Rep. 1099, it was held that in determining the question of plaintiff's negligence in stepping from a moving train onto a station platform, the jury should consider the age, sex, and physical condition of the plaintiff, and, if a reasonably prudent person of such character would not have made the attempt, there is contributory negligence, preventing a recovery. The court said: "The act of the plaintiff was to be judged by a comparison with the acts of persons of ordinary prudence under similar circumstances. The age, sex, and physical condition were circumstances necessarily affecting her safety in stepping from a moving train, and should have been considered by the jury, in connection with all other such circumstances in proof, in determining whether she acted prudently or recklessly. A young, active man might prudently alight, when the attempt would be reckless in an old or lame man; and any man might do so prudently, when it would be dangerous for a lady in female attire to attempt it."

FOSS

v.

BOSTON & MAINE R. CO.

(New Hampshire Supreme Court, July 25, 1890.)

Passenger Carried beyond Station—Injury in Alighting—Assistance of Employes.—A passenger who has been carried beyond the station platform has a right to rely on the assistance offered by the conductor and brakeman to aid her in getting off the train, and if, by reason of the flustered state of her mind and the fear of being carried beyond her destination, she does not notice the distance of the car step from the ground, and they fail to assist her from the car without injury, it is the fault of the carrier.

Same—Dangerous Place to Alight—Contributory Negligence.—The question whether a passenger who is in feeble health, and whose mind is flustered, is guilty of contributory negligence in attempting with the assistance of the company's servants, to alight from the cars at an unsuitable place, the train having been drawn beyond the station, is for the jury.

Passenger in Feeble Health—Notice to Conductor.—Knowledge communicated to the conductor of a train that a passenger is feeble and will need assistance in getting off is notice to the carrier, and it is not necessary to notify every other conductor and train hand that may be in charge of the train.

EXCEPTIONS from Strafford County.

Case for injuries in alighting from defendant's train and walking from 500 to 700 feet to the passenger station at Rowley, in consequence of the train having overshot the station. The plaintiff, who was in feeble health, took the defendant's cars at Rochester, N. H., July 31, 1888, having a ticket for Rowley, Mass. Her husband assisted her into the car, which went through, with her valise, which weighed from 15 to 20 pounds, and which she was unable to carry because of her weakness. He then went to Jefferson, the conductor of the train, and told him: "I have seated my wife in the third seat from the front end of the car, [pointing it out,] on the left side, and she has a valise in the seat with her. She is going through to Rowley, and isn't very well, and is not able to lift her valise and get off the cars without assistance, and I wish you would look out for her and see that she has assistance in getting from the cars at Rowley." Jefferson replied that he was not going through himself, but that he would speak to the conductor who would take the train at Conway junction, and "it will be all right." Her husband went into the car and informed the plaintiff what had passed between him and the conductor, and that she need give herself no uneasiness, as she would be looked out for. The plaintiff proceeded on

her journey to Conway junction, and thence with new conductors and new train hands to Rowley without changing cars, and her ticket was punched and taken up by the conductor. The plaintiff's evidence tended to show that at Rowley the train overshot the platform, so that she had to walk back to the station, some 500 to 700 feet. The evidence tended to show, and her own testimony was, that the train did not stop, but only slowed up, at Rowley. As the train slowed up, the station was called, and she rose up in her seat and stepped out into the aisle. Finding the train still moving, she stepped to the door and spoke to the assistant conductor, Odell, and asked him if the train did not stop so she could get out. He said: "You can't get out now; the train is in motion." She then told him it was very necessary for her to get off at Rowley, and very necessary for her to have her baggage. The train was stopped, and a brakeman came and took her baggage, and he and Conductor Odell or some one else helped her from the train. When the conductor or brakeman took her baggage out of the car, he said: "Come, hurry up and get off." With their assistance she was jumped down a distance of 22 inches from the lower step of the car to the ground, at a place where there was no platform or any convenience for alighting. She claimed to have received an injury to her side by being compelled to alight in this manner, and said that she felt something give way in her side when she jumped down. She also claimed to have received an injury to her health by being compelled to alight in the manner and at the place described, and by the fatigue induced by walking back to the platform. Her testimony was that at that time she was unable to walk more than six or eight rods; that she had not walked more than six or eight rods at one time for a year before that time: and that walking made her breathe short, and caused pains in her side and lungs. She testified that the ground she was obliged to walk upon in getting to the station was rough, and that it was very hard walking, and made her very tired. The plaintiff did not claim that she said anything to the employes about her feeble condition further than what was said to the conductor at Rochester, or that she objected in any way to taking the jump down from the car step, or tell them that she was in such a state of health or feebleness as to make it hazardous for her to step down, until she was on the ground, but she testified that, being seated on the opposite side from the depot, she did not see it when she passed it, and, when she was directed to leave the car, she supposed that she was to alight upon the platform; that upon ascertaining that she had been carried past the depot, and being much excited by the situation, and

told to hurry up, she did not observe the distance she would be compelled to walk until she had left the car; and as soon as she had discovered the situation she said, "Have I got to walk back as far as that? I have not walked so far for a year,"—to which the reply was, "Yes, that is the station, and look out you don't get under the cars," and the train started on immediately. Upon this evidence the defendant moved for a nonsuit. The motion was denied, and the defendant excepted.

The defendant requested the court to charge the jury as follows: "If the plaintiff was sick or from any cause unable to take care of herself, she should have been provided with proper attendants. If she was in such a condition of health that she could not alight at that place, she, knowing her condition, and the railroad employes being ignorant of it, should have notified them of it, and have them set back the car to the platform. She had no right to get off there at the risk of the company, and cannot recover for any injuries she then received. The law does not contemplate that it is any inconvenience, loss of time, expense, or injury to a person in sufficiently good health to travel without an attendant, to be carried beyond the platform by the overshooting of a train so far as to be obliged to walk four or five hundred feet over a walk of not extraordinary difficulty. If she was unable to lift her baggage, as she says she was, she should have had it checked; and this was still more her duty because she said she did not need it till she reached her place of destination. In the case when, as she claims, the train overshot the platform, the railroad discharged all its duty to the plaintiff when its employes helped her alight without objection on her part. As to the case described by her, there being no unusual change at that point, her injury resulted not from any unusual danger incident to alighting at that point, but to the undisclosed condition of her health. As there is no pretense or claim that any of the defendant's servants were informed by her or had any intimation from any other source that she was suffering from any physical disability till after she got off the train, they had a right to presume that she was capable of getting off the car with the aid of two of the employes, and also capable of walking the distance she walked to the platform. In order to make the railroad liable for the injuries received by her in getting off the car or walking back, because of any physical disability from which she suffered, it was necessary for her to tell the employes at the time about her disabled condition, so that they might provide suitable conveniences for her to descend from the cars, or so that they might back up for her to get off. It was not sufficient merely

to inform the conductor at Rochester, who did not run through to Rowley, that she was suffering from any physical disability which prevented her from walking four or five hundred feet, or from getting off the cars without help, but she was also under obligation to inform the employes, on whom at that time devolved the duty of helping her off, about her disabled condition. That she cannot recover for any injury caused by fatigue induced by walking from the place of getting off to the station. When this new situation arose of her getting off at this place under these circumstances, not contemplated when she was put on the train at Rochester, it was incumbent on her to inform the employes there present of her feeble condition." The court declined to give the instructions except so far as they are covered by the following instructions given, and the defendant excepted. Upon these points the court charged the jury, in substance, that it was the duty of the defendant, under its contract with the plaintiff, to provide suitable cars and conveniences for the safe carriage and delivery of the plaintiff at a suitable place at the termination of her journey, and to exercise the highest care in the performance of this service to guard against injury to the plaintiff, and that it was the duty of the plaintiff to exercise reasonable care to avoid injury during the journey. Was the plaintiff injured by alighting from the cars and walking to the station, and, if so, was the injury caused by the defendant's fault in leaving her at an unsuitable place? If the place was suitable, and the defendant fully performed the duty it owed to the plaintiff, the defendant is not liable for any injury the plaintiff may have received. If the place was unsuitable, and the plaintiff received injury in consequence, the defendant is liable, unless the plaintiff's want of care contributed to the injury. Was the plaintiff in fault for being left at that place, or for leaving the car without objection, or saying anything about her feeble condition? Was she induced to alight there by the defendant's servants? Did her want of ordinary care contribute to her injury? In determining the question of the care exercised by the plaintiff and by the defendant, the evidence that the plaintiff's husband informed Conductor Jefferson at Rochester that the plaintiff was feeble and would need assistance, and that Jefferson said he would notify the conductor who was to take the train at Conway junction, and it would be all right, and that the plaintiff's husband so informed her, is material. Knowledge communicated to Jefferson was notice to the defendant of the plaintiff's condition, and she was not required to notify every other conductor and train hand on the train. Was the plaintiff in fault in relying upon the assurance given her that Jefferson would notify the conductor who took the

train at Conway junction, and it would be all right? The question of care is to be determined upon the state of things existing at the time. If the plaintiff's want of due care under the circumstances in which she was placed contributed to cause her injuries, the verdict should be for the defendant. If the plaintiff received injuries through the fault of the defendant, and without fault on her part, she was entitled to a verdict for damages. The defendant excepted to the charge as to the notice to Jefferson. The plaintiff had a verdict.

Russell & Boyer and W. L. Foster, for plaintiff.

Worcester & Gafney and J. A. Edgerly, for defendant.

ALLEN, J.—The motion for a nonsuit for want of evidence to charge the defendant was properly denied. The plaintiff, without apparent fault of her own, was carried some distance—500 to 700 feet—beyond her destination, to which she had a ticket, and there hurriedly assisted from the car to the ground, over steps of which the lowest was 22 inches above the ground. The injury she received in leaping to the ground was aggravated by being compelled to walk from her landing place to the station. In the flustered state of her mind, and the fear of being carried beyond her destination, she did not notice the distance of the car step from the ground. She had a right to rely on the assistance offered by the conductor and brakeman at such a place and, if, they failed to assist her from the car without injury, the fault was the defendant's and not hers. However this may be, the question of her own negligence or want of care was fairly submitted to the jury, whose verdict, under the instructions, has left her free from fault. The case in principle is not different from *Bullard v. Boston & M. R. Co.*, 64 N. H. 27, 27 Am. & Eng. R. Cas. 117, where the rear car, in which plaintiff was riding, did not reach the platform, and she was injured on leaving it by the steps, which were about three feet from the ground. The plaintiff recovered a verdict, and the court in the opinion decided that "these facts were evidence from which a jury might find that the plaintiff exercised due care in leaving the train at the place which she knew was a bad one for alighting, and, further, might find that the defendant intended she should leave at that place." In that case the car step was 14 inches further from the ground than in the present case, but the plaintiff had no assistance in alighting, and the distance from the station platform was very much less. The question of the reasonable care of the parties was the same in each case. The defendant's first exception is overruled.

The defendant requested the instruction that the plaintiff,

Plaintiff had
right to rely
on assistance
of servants.

enfeebled as she was, should not have attempted to get off the car at the place she did, but should have notified the attendant train hands of her condition, that they might have set the train back to the station, where she could have alighted on the platform in safety; that, no notice being given them of her feeble condition, she cannot recover. Such a request was properly refused. It left out of sight the fact that, at the time, the train had passed the station platform a long distance, and the step of the car, from which she must leap, was too high for a well person to step from safely. The request, too, leaves out of sight the flustered condition of the plaintiff's mind under fear of being carried beyond her destination, and the fact that, until she struck the ground, she was not aware that the car had passed beyond the station platform. The instruction which the court gave was sufficiently explicit. The jury were told "if the place [where the plaintiff left the car] was suitable, and the defendant fully performed the duty it owed to the plaintiff, the defendant is not liable for any injury the plaintiff may have received." "If the place was unsuitable, and the plaintiff received injury in consequence, the defendant is liable therefor, unless the plaintiff's want of care contributed to the injury. Was the plaintiff in fault for being left at that place, or for leaving the car without objection, or not saying anything about her feeble condition? Was she induced to alight there by the defendant's servants? Did her want of ordinary care contribute to her injury?" These pertinent instructions and inquiries made to the jury were plain and explicit, covered the ground of the case, contained the settled law on the subject, and were sufficiently favorable to the defendant. The exception to the refusal of the defendant's request is overruled.

Plaintiff not
guilty of con-
tributory
negligence.

A special exception was made to the instruction that, in determining the question of care exercised by the defendant and plaintiff, the evidence that the plaintiff's husband informed Conductor Jefferson, at Rochester, that the plaintiff was feeble, and would need assistance, and that Jefferson said he would notify the conductor who was to take the train at Conway junction, and it would be all right, and that the plaintiff's husband so informed her, is material. Knowledge communicated to Jefferson was notice to the defendant of the plaintiff's condition, and she was not required to notify every other conductor and train hand on the train. A conductor, who had charge of the train and the oversight of its passengers, was the proper person to whom a knowledge of the plaintiff's health and need of assistance in leaving the train should be given; and the plaintiff had a right to rely on

his assurance that he would inform the conductor beyond. The question was one of due and reasonable care. The plaintiff relied, and had a right to rely, on Jefferson's giving his successor the information about her condition; and, if the conductor failed to bring her condition to the notice of the conductor that followed him, his neglect would not be charged upon the plaintiff. The defendant was as much affected by Jefferson's knowledge as it would have been by the same facts communicated to the superintendent, or one of the directors of the road, in season to have made use of them. The defendant had no reasonable ground of complaint on account of the instructions. Judgment on the verdict.

CLARK, J., did not sit. The others concurred.

Liability of Carrier for Injury to Passengers in Feeble Health.—See *Owens v. Kansas City, St. Jo. & C. D. R. Co.* (Mo.) 33 Am. & Eng. R. Cas. 524; *Louisville, etc. R. Co. v. Fleming* (Tenn.), 18 Am. & Eng. R. Cas. 347, note 362; *Atchison, etc. R. Co. v. Weber* (Kan.), 21 Am. & Eng. R. Cas. 418.

Greater Duty to Female Than to Male Passenger.—While the duty of the carrier to all passengers is the same in degree, the amount of care may vary with the age, sex, or bodily infirmity of the passenger, and the carrier is not entitled to a charge that it owes no greater duty to a female passenger than to a male one. *St. Louis, A. & T. R. Co. v. Finley* (Tex. Dec. 12, 1890), 15 S. W. Rep. 266.

Injury While Alighting from Car—Opinion of Witness as to Cause of Accident.—In an action for injuries received while alighting from a railroad car, after the witness for the plaintiff has testified that he saw the plaintiff step from the car steps on to a box placed there for that purpose he cannot be asked on cross examination, whether it occurred to him at the time that the accident happened by reason of the darkness, or of the inattention of the plaintiff to the step being there. *Kelley v. Detroit L. & M. R. Co.*, 80 Mich. 237.

Carrying Passenger Beyond Station—Stopping Car at Request of Passenger—Walking Back.—In *Wilson v. New Orleans & N. E. R. Co.* (Miss. Nov. 10, 1890), 8 So. Rep. 330, it appeared that a passenger on a train, after being carried beyond his station while asleep, was awakened, and at his request, the train was stopped that he might get off and walk back. While so walking, he narrowly escaped being run into by a freight train on a trestle. He was afterwards sick from the effects of the excitement. *Held*, that he had no redress against the company, though the conductor misled him as to the exact place where the train was when he got off.

Passenger Alighting on Wrong Side of Train—Violation of Rule—Contributory Negligence.—In *Drake v. Pennsylvania R. Co.*, 137 Pa. St. 352, it was held that when a passenger knows that on one side of the track no platform or place for alighting from trains has been provided, and that there is a safe and convenient platform upon the other side, for the use of passengers in entering and leaving trains, such knowledge is notice of a rule of the company that passengers shall get on and off trains at said platform. When a railroad company has provided safe and convenient means of ingress and egress to and from its trains, upon one side of the track, it has in this particular discharged its whole duty to passengers, and it is not bound to anticipate that, in disregard of its reasonable and known regulations, will alight upon the opposite side. Wherefore, a passenger, who, with no-

tice of a regulation requiring him to alight from his train upon the south side of the track, voluntarily alights upon the north side, and in alighting, is injured by falling into an unguarded excavation made by the railroad company, cannot recover damages from the company for his injuries. The fact that the company has permitted persons residing north of its road to cross its right of way and track on foot, at different points in the vicinity of its station building, in going between different parts of the town, is not a waiver of its regulations affecting its passengers, nor a permission to them to alight on the north side. Evidence that occasionally a passenger would get off on the north side of the company's trains, cannot affect the rights and duties of the passenger, when it is not shown that the railroad company consented to or had knowledge of such practice, nor is such testimony admissible.

Injury in Alighting—Evidence as to Customary Stopping Place.—In an action by a passenger for personal injuries received while alighting from defendant's train where defendant's theory of the accident is that plaintiff was injured while attempting to alight from its train before it arrived at its usual stopping place and while it was in motion, and plaintiff's theory is that it was at its usual stopping place, and was stationary, evidence of what had previously been the customary stopping place at that station is admissible. *Alexandria & F. R. Co. v. Herndon* (Va. Dec. 4, 1890), 12 S. E. Rep. 289.

OLSON

v.

ST. PAUL & DULUTH R. CO.

(45 Minnesota, 536.)

Passenger—Boarding Car—Assurance of Safety by Conductor.—The conductor to a railroad train represents the corporation; and persons boarding a car with his consent, have a right to rely upon his assurance that it is safe to undertake so to do before the train moves. Accordingly, when a passenger having care of stock in a freight car, requiring his attention, attempts to enter the car with the sanction of the conductor, and with his assurance that it is safe, and that he will have ample time to do so before the train moves, and is injured by a sudden and unexpected movement of the train while in the car, the company is liable.

Personal Injuries—Excessive Damages.—A verdict for \$10,000 for personal injuries will not be disturbed as excessive, where it appears that the injury resulted in the amputation of plaintiff's foot near the ankle, causing the plaintiff great pain and suffering and leaving him a cripple for life.

APPEAL from Washington District Court.

Andrew Olson sued the St. Paul & Duluth Railroad Company for damages for injuries received, and recovered judgment for \$10,000. Defendant appeals.

Wm. H. Bliss and *J. N. Castle*, for appellant.

Arctander & Arctander and *Fayette Marsh*, for appellee.

VANDEBURGH, J.—The plaintiff's foot was caught and injured between the bumpers of freight cars while climbing

into one containing live stock which he claims was under his charge, through the alleged negligence of the defendant, in the sudden and unexpected movement of the train, without any signal or notice. The stock, including horses and cattle, belonged to one Newhaus, and was being transported in two cars from Appleton, on the Manitoba road, to Hinckley, on the defendant's road, and from that station to Duluth, by the defendant company. The plaintiff's testimony tended to show that he assisted Newhaus in loading the stock, and that afterwards he went on board one of these cars at the request of Newhaus, to accompany and help care for the stock, and continued to occupy the same car until he was hurt. After passing Hinckley, he was in the car where the horses were with no other attendant, and was noticed by the conductor of the train, and, in response to an inquiry of the latter, informed him that he was there in charge of the horses. The conductor, however demanded his ticket, and notified him that he must either get out of the car or pay his fare. Plaintiff then handed five dollars to the conductor, who received it, and promised to get and return him the change. They were then at Finlayson, where the accident subsequently occurred, and where the conductor informed the plaintiff that the train would remain an hour or more. Plaintiff thereupon left the train, for a drink of water as he says, and soon after, observing that one of the horses was loose in the car, biting and teasing the others, he started back for the purpose of climbing into the car again in order to secure the horse, when he met the conductor in charge of the train, and informed him that the horse had got loose again in the car, and inquired of him if it would be safe to go in there and tie him up, to which the conductor replied: "Yes, you are perfectly safe, for the train is not going to stir before the passenger comes up." Relying on this assurance, as he says, he went between the cars, climbed up over the couplings, slid back the door, the only means of ingress, and was in the act of entering, when the train started with a sudden jerk, and he fell back between the cars, and his foot was caught and crushed between the bumpers. The foregoing is substantially the case as presented by the plaintiff's evidence. There is a sharp conflict between the testimony of the plaintiff and the conductor, who denies that he either expressly or impliedly consented to the plaintiff's riding in or returning to the stock car, or that he had any conversation with plaintiff in respect to the movement of the train. There is a conflict also between the witnesses as to whether the train was standing on the side or main track. One of the defendant's witnesses testified that one of the horses was loose, as sworn to

by the plaintiff, and one also agreed with him as to the location of the train on the side track at the time of the accident. But this is important only as affecting the credibility of the witnesses. The leading questions of fact, whether the plaintiff was charged with any duty in looking after the stock in the car, and was permitted to return to the car for the purpose of hitching the horse, and especially whether his statements that he would be safe in doing so, and that the train would not move, were questions to be determined by the jury, and this court will not interfere with the discretion and determination of the trial court in refusing a new trial thereon. The conductor had control of the movements of the train, and so far represented the company. The plaintiff was entitled to rely upon his assurance that it would not be moved, and that it would be safe for plaintiff to visit the car, and the company was bound by his acts and statements in reference to it. If the testimony of the plaintiff is true in respect to his obligation to care for the stock, and they required attention, it was proper for him to enter the car for that purpose, with the knowledge and consent of the conductor, who must have known the situation of the door of the car; and, if the train was not to be moved for a considerable time, we are unable to see that there was anything in plaintiff's conduct in visiting the car which conclusively establishes contributory negligence on his part. It was, at least a question for the jury. Whether the rules of the company allowed drovers or their servants to ride in stock cars to watch and care for stock or not, is not, we think, material, under the issues as presented by the evidence in this case. There is no presumption against the authority of the conductor to allow them to visit the car, and look after their stock while stopping at a station; and there is no evidence of any rule limiting his authority. We think the evidence in plaintiff's behalf made a case for the jury. *Wright v. London & N. W. R. Co.*, 1 Q. B. Div. 255-257; *Fowler v. Baltimore & O. R. Co.*, 18 W. Va. 579, 584, 8 Am. & Eng. R. Cas. 480; *Pool v. Chicago, M. & St. P. R. Co.*, 53 Wis. 657, 3 Am. & Eng. R. Cas. 332; *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 134, (Gil. 110.)

2. The trial court also considered the question of excessive damages, and was of the opinion that the amount fixed by the jury, though the verdict was large, was not so far disproportionate to the nature and extent of the injury suffered as to warrant it in setting aside the verdict.. We esteem the judgment a large one, and if the trial court had been of the opinion, from its impressions of the case upon the evidence, that the verdict ought to have been set aside, this court

would not have interfered. But there was no abuse of discretion in refusing a new trial on that ground. In support of the verdict, the evidence on the part of the plaintiff tended to show, among other things, that the foot was amputated near the ankle, but so as to save the heel. At the time of the trial, more than a year and a half after the injury, there was a running sore on the "stump" of the amputated limb, and he had endured great pain and suffering, which continued up to the time of the trial. He was crippled for life, and his limb, which was exhibited to the jury, was liable to continue to cause him suffering in the future. He was 45 years of age, and had been a carpenter, and able, previously, to earn good wages. Evidence of these and other facts testified to was before the jury. It is a case from the nature of which the trial court was in much better position to judge of the question than an appellate court could be. Each case must stand largely upon its own facts, and the question is one peculiarly for the jury. *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wis. 146, 19 Am. & Eng. R. Cas. 285; *Berg v. Chicago, M. & St. P. R. Co.*, 50 Wis. 419, 428, 2 Am. & Eng. R. Cas. 70. Order affirmed.

OLIVIER

v.

LOUISVILLE & NASHVILLE R. CO.

(*Louisiana Supreme Court, May 18, 1891.*)

Passenger Riding on Platform—Overcrowding Car.—A party voluntarily boarding a crowded train and taking his place on the platform of a car, without complaint or effort to obtain a seat or other better accommodation, cannot assign the overcrowding of the train as negligence in the railroad company.

Same—Knowledge of Conductor.—On the other hand, when the conductor sees him in that position and collects his fare without objection, the company cannot attribute its occupancy as negligence.

Same—Duty of Passenger and Company.—In such case the passenger is bound to conduct himself with the care and caution which his position requires, and the company is bound to guard him from danger incident to the position arising from its own acts.

Admissions as to Cause of Injury—Evidence—Impeachment.—A party's admissions as to the cause of an injury for which he claims damages are good evidence against him, and the statements of a companion made in his presence without contradiction may have the like force with his own admissions. In his case the latter were also admissible as part of the *res gestæ*, and to impeach his testimony given on the trial, for which foundation was duly laid.

Verdict of Jury—Review of Findings on Facts.—While always disposed to give to verdicts of juries all proper weight, the law of this state imposes on the court the duty of reviewing their findings on the facts as well as on the law, and when, upon the evidence before us, it appears that a verdict is manifestly erroneous, we are bound to reverse it.

APPEAL from Civil District Court, Parish of Orleans.

Bayne, Denegre & Bayne, for appellant.

Branch K. Miller, for appellee.

FENNER, J.—The cause of action is substantially as follows : That plaintiff became a passenger on defendant's railroad, having duly paid his fare for passage to Milneburg ; Case stated. that, owing to the crowded condition of the train, he was compelled to ride on the platform of one of the cars ; that on approaching Milneburg the engineer sounded the whistle to announce the stop about to be made ; that the speed of the train was diminished by degrees, inducing petitioner to believe it was about to stop, when the said train was suddenly and violently put in sudden motion by the engineer thereof, causing a sudden and violent jerk or start, which threw petitioner from the platform under the wheels of the car, which passed over his foot, and occasioned injuries which necessitated the amputation of his leg below the knee ; that said injuries were due solely to the fault and negligence of defendant in this particularly. "(1) That he should have been provided with a seat in said train and not have been compelled by the overcrowding of said car to ride on the platform. (2) That said train should not have been suddenly started after the diminution of its speed, and the preparation and apparent intention of the engineer to stop the same." Plaintiff avers his freedom from any contributory negligence, and demands \$20,000 as damages. Defendant answered by a general denial. The case was tried before a jury, resulting in a verdict and judgment in favor of plaintiff for \$5,000, from which the present appeal is taken.

The first ground of negligence assigned against the company has no weight. According to his own statement plaintiff boarded the train at a way station after seeing and knowing that the train was crowded, and he also knew, from his constant habit of traveling on the road, that the trains on this day of the week and hour were customarily crowded. He voluntarily took his place on the platform, but he was lawfully there, because he occupied that position when the conductor collected his fare, and the latter made no objection thereto. He was bound to conduct himself with the care and caution which his position suggested and required, and the

Passenger on
platform—
Negligence
and contribu-
tory negli-
gence.

company was bound to protect him from dangers incident to that position arising from its own acts.

The serious issue of law and fact arises under the second assignment of negligence, viz., in starting the train, when on

Evidence as to
cause of acci-
dent re-
viewed.

the point of stopping, with such a jerk as to throw the plaintiff off. Plaintiff produces no evidence as to the accident except that of himself and his companion, Larose. Plaintiff says that he and Larose were going out to the lake to fish; that they boarded the train at a way station; they saw the train was full, but got on the platform; plaintiff carried a basket; he took his seat on the platform of one car, with his feet resting on the step, while Larose sat on the platform of the car in front of him; when the car reached Milneburg and the whistle had blown, he got up and stood with his basket on one arm, and holding the railing with the other hand, to be ready to get down when the train stopped; that while thus standing, and after the motion of the train had become very slow, the train was suddenly started, and gave a violent jerk which threw him off. Larose gives a like account, with some further particulars. He says: "When she got just about a block before the old station she blew, and Charlie says, 'Get ready.' I says, 'No, she is going too fast.' When we reached about the engine house, he says, 'Get ready.' I says, 'No, we can't; she is going too quick.' When we got about the corner she started to slack up, but not enough for us to get down, and when Charlie got right by the hotel he stood up that way, and he told me to get ready, and I says, 'Leave the car stop; I believe she is going to the wharf.'" He adds that at this point the train gave a violent jerk, and Olivier was thrown off. The engineer denies most positively that he gave the train any forward motion after slowing down, or did anything to cause a jerk. No witness is produced to show that there was any such jerk except Olivier and Larose. Welsh, who was one of the conductors at that time, but who is no longer in the employ of defendant, says that he went to where plaintiff was lying after the accident, and asked Larose, who was with him, how it happened, and Larose said, "It was all his own fault;" and that "he was in the act of jumping, or jumped off, and fell." Ross, the other conductor, who also is no longer in defendant's employ, says: "I went to Mr. Olivier. He was sitting on the ground, and he says, 'I went to jump off, and fell down, and my leg went underneath;' and he says, 'I do that every Sunday;' and I says, 'You ought not to do that; you ought to wait till the train stops.'" Philibert, the clerk and operator at the police station to which plaintiff was carried, says: "He had been brought in from Milneburg,

and put in the station, and the ambulance sent for, and while waiting for the ambulance, so as to make a report to the chief office, as we do in all cases, I asked the man for a statement as to how he got hurt, how his foot was mashed; asked him how it happened; and he said it was his own fault; that he jumped off the car, and the train run over his foot." Habans, a police officer stationed at Milneburg, says: "I was on the rear coach of the train when the coach stopped—I mean the train—and I looked out, and saw a lot of people congregated around the hotel gate, and I run down there to see what was the matter, and I saw a man sitting on the ground with his face towards the train, and his friend Larose with him. I says to him, 'Charlie, how did that happen?' and he says, 'I tried to jump off, and I got my foot mashed.' So I went on and notified the engineer that the man was hurt, and he backed the baggage car down to put him in there. He also adds: "His friend told me that Mr. Olivier had his basket on his arm, and the train going in that direction, and, when he attempted to jump off with his basket on his forward arm so, the basket struck the hand rail of the platform of the car, and it threw him down." Olivier and Larose, on re-examination, stoutly deny having made the statements attributed to them. Olivier seems to deny that he was asked any questions, or made any answers to any one. Larose says: "Olivier said it was only bad luck, and I said so myself." It is a significant fact that neither Olivier nor Larose pretend to have said anything at that time about the jerk of the train, rendered more significant by the fact that this suit was not brought until nearly seven months after the accident; and, so far as the record discloses, that was the first time defendant heard anything about a jerk of the train. It is further shown that plaintiff had been a constant traveler on this train for years, and that he had frequently jumped off the train before it stopped. Larose's statement strongly intimates that plaintiff was making preparations to jump, and was only restrained by his remonstrance. We cannot doubt that the conductors and the police officers did question Olivier and Larose as to the cause of the accident. It was their official duty to make such inquiries, because they had to render reports to their superior officers. If Olivier and Larose then attributed the accident to the jerk of the train it would have been natural for them to have said so, and it is passing strange that they did not; yet neither of them pretends that they said anything about it. According to their own account they simply said, "It was only bad luck." No motive is suggested why the two police employees should have sworn falsely, and they fully confirm the statements of the

conductors. They are supported by all the independent circumstances, negative as well as positive. We have studied carefully the whole evidence, and have endeavored to state it fairly. Can it be expected that we should affirm a judgment against defendant for \$5,000 on such proof, in view of the imperative requirement that plaintiff is bound to make

his case reasonably certain? Nothing is more irksome to us than the necessity we so frequently encounter to reverse the verdicts of juries in cases of this character. We are disposed to give their findings all the weight to which they are entitled; but the law of this state imposes on us the duty of reviewing their verdicts both on the facts and the law, and when the evidence submitted to us manifestly fails to support the verdict we are bound to reverse it. We believe Olivier and Larose did make the statements attributed to them, and that those statements, made under the circumstances must be taken as true. The statements of Olivier are good evidence against him as his own admissions; and the statements of Larose made in his presence and without contradiction by him partake of the same character. Moreover, they are all part of the *res gesta*. It matters not whether they are considered as independent proof, or merely as destroying the credibility of the witnesses who swore in contradiction of their own prior statements; in either case they destroy plaintiff's action, because it has no other support than the testimony of these witnesses. It is therefore adjudged and decreed that the verdict and judgment appealed from be annulled and set aside, and that there be now judgment in favor of defendant rejecting plaintiff's demand, at the latter's cost in both courts.

Verdict not supported by evidence.

Contributory Negligence of Passengers Riding on Car Platforms.—See *post* McCauley v. Tennessee C., I. & R. Co., and note.

MCCAULEY

v.

TENNESSEE COAL, IRON & RAILROAD CO.

(Alabama Supreme Court, June 25, 1891.)

Passengers—Riding on Platform—Contributory Negligence.—A regulation of a railroad company which forbids passengers to stand upon the platform while the car is in motion, is not only reasonable, but proper; and if a passenger having knowledge of such regulation, unnecessarily exposes himself in violation of the rule, he does so at his own peril.

Licensee on Car—Responsibility of Company for Injuries.—A railroad company is responsible for injuries sustained by a mere licensee on its train, or his death, only when caused by its wanton or intentional wrong.

Same—Trespasser—Instruction—Harmless Error.—In an action against a railroad company for a death alleged to have resulted from its negligence, where it is shown that deceased was on defendant's car, which was not for passengers, by mere license and no wanton or intentional wrong is shown, an instruction that deceased was a mere trespasser is harmless error.

APPEAL from City Court of Birmingham.

Action by James McCauley against the Tennessee Coal, Iron & Railroad Company to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Judgment for defendant, and plaintiff appeals.

Bowman & Harsh, for appellant.

Hewitt, Walker & Porter, for appellee.

COLEMAN, J.—Railroads are held strictly responsible for all damages sustained by passengers traveling upon their lines by reason of fault or negligence on their part, and by statute, in many cases, when damage results, the presumption of negligence arises. For their own protection railroads are permitted to make all reasonable rules and regulations conducive to the safety of passengers. A regulation which forbids passengers to stand upon the platform while the car is in motion is not only reasonable, but proper; and if a passenger having knowledge of such regulation, unnecessarily exposes himself, in violation of the rule, he does so at his own peril, and not at the peril of the railroad. This is the law clearly stated in the case of *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 116, 18 Am. & Eng. R. Cas. 194, and is fully sustained both upon reason and authority. The testimony conflicted as to whether plaintiff's intestate was inside the car or upon the platform when the car struck the cow, and which caused the car to leave the track. There was evidence tending to show that deceased and one other person were upon the platform when the cow was struck, and that both persons fell between the cars, and were run over and killed. There was evidence tending to show that none of the persons who remained inside the cars were seriously hurt, and the evidence tended to show there was room inside for deceased if he had chosen to remain inside. There was evidence also that plaintiff's intestate knew of the regulation which prohibited persons from being on the platform while the car was in motion. The correctness of the rulings of the trial court in giving or refusing charges must always be tested by reference to the testi-

Passenger on
platform—
Contributory
negligence.

mony before the jury. The evidence showed that the train upon which deceased was riding was used by the defendant to carry its own employes and their tools to and from their place of work, and was not used for the transportation of passengers. It was a rule of the defendant, and known to plaintiff's intestate, that no one should ride upon this train except defendant's employes, without the permission of the defendant's superintendent, who at this time was one McCormick. The evidence tended to show that one J. W. Watts was getting out timbers for defendant's company at so much per thousand at a place along defendant's line, and that Watts had a number of men employed in his service, and among them was plaintiff's intestate, and that his (Watts') employes boarded with him at Pratt Mines. That Watts and his employes had been in the habit of boarding this train every morning as it passed Pratt Mines, to go out to their work; and, as it returned in the evening, would come in on it to their place of lodging. Watts and his employes paid no fare, and none was demanded of them. The witness Watts testified that for six months he and his employes had been in the habit of going out to his work and returning on this train without objection from any one; and this witness, without objection, was permitted to testify that he was certain the superintendent knew of this habit. There was evidence tending to show "that the superintendent had no knowledge that any one who was not an employe of the defendant rode on the train." We do not think, under this state of the evidence, the court, as a matter of law, was authorized to assert that defendant's intestate was a trespasser. If the superintendent knew that for six months, morning and evening, Watts and employes rode upon this train to and from his work, and was still engaged in the same work, a license to continue to ride upon the train might be presumed, unless notified to the contrary by the conductor or superintendent. It is clear that defendant's train was not a passenger train within the meaning of the law, and that plaintiff's intestate was not a passenger, entitled, as a matter of legal right, to ride upon the train. The evidence, favorably stated for the plaintiff, shows that defendant owed no duty to plaintiff's intestate as a passenger; that, as a matter of convenience, Watts and his employes availed themselves of defendant's cars, used by defendant for its own employes only, and not for the use of passengers, to reach their work; thus saving time, expense and labor, without a profit or benefit to the defendant. It would be gross injustice, under such circumstances, to hold defendant to the same degree of care as the law affords to passengers. The

Deceased a
mere licensee.

law, sustained by many authorities, and founded on common sense, imposes an obligation upon any person who invites or induces another to come upon his premises, to provide for his security, and guard him against dangers to which he may be exposed; but one who avails himself of a mere license, and enters upon the premises of another, has no right to require of the owner that he keep his premises in a safe condition; and the owner in such cases is not responsible except for wanton or intentional injury. The few exceptions to this general rule have no bearing in this case. The facts of this case clearly distinguish it from those where the carrier by invitation induces another to enter the train, or undertakes to carry another by contract, express or implied, whether made with the person to be carried or with another for him, or with one or more for the carriage of an indefinite number of unknown persons, as where a car may be chartered by one or more for an excursion, and similar cases, or where the law imposes a duty to carry, or this duty arises from contract, in all of which it has been held that the railroad was required to exercise the same care and diligence for the safety of such persons as if they were strictly passengers. Hutch. Carr. §§ 563, 564. The defendant railroad company owed no such duty to plaintiff's intestate. He knew that the train was not a passenger train; that its only purpose and use was to carry defendant's own employes to and from their work; and that without the consent of the superintendent no one, not even with the consent of the conductor, not an employe of the defendant, was allowed to ride upon this train. Not having permission of the superintendent, the knowledge and acquiescence of the superintendent that he rode upon the train, availing himself of this means of transportation for his own convenience and comfort, was at most a mere license in which the licensee assumed all risk of the carriage, except such as might result from wanton or intentional wrong, or a failure to exercise due care to avert the injury after his danger was apparent,—a duty imposed upon all persons and corporations under similar circumstances, in view of the great value of human life and limb. *Frazer v. South & N. Ala. R. Co.*, 81 Ala. 185, 28 Am. & Eng. R. Cas. 565. The rule that a person when exposed to sudden and unexpected danger, is not responsible for acting without judgment, or "wildly," depends materially upon the facts and circumstances of the case, and as to whether he has wrongfully and voluntarily put himself in a place of danger. The court very properly charged the jury that they "were not authorized to find from the evidence that the injury to plaintiff's intestate was inflicted either

Defendant not
liable for
death.

willfully, wantonly, or recklessly." After the most favorable consideration of the evidence for plaintiff, we are of the opinion the court would have been justified in giving the general affirmative charge for the defendant. The error in charging that plaintiff's intestate was a mere trespasser was error without injury, and we affirm the judgment of the trial court. The judgment must be affirmed for another reason. The bill of exceptions does not purport to set out all the evidence, or substantially all, and under such such circumstances we must presume there was evidence to support the action of the court in the charges given. Affirmed.

Error in charging that deceased was trespasser.

Contributory Negligence of Passengers Riding on Car Platforms.—See *Malcom v. Richmond & D. R. Co.* (N. Car.), 44 Am. & Eng. R. Cas. 379; *Louisville & N. R. Co. v. Bisch* (Ind.), 41 *Id.* 89, note 92; *Central R. & B. Co. v. Miles* (Ala.), 41 *Id.* 149; *Dewire v. Boston & M. R. Co.* (Mass.), 37 *Id.* 57, note 60.

Riding on Street Car Platform not Negligence Per Se.—In *Upham v. Detroit City R. Co.*, 85 Mich. 12, it was held that it is not negligence *per se* to ride on the platform of a street car, though there is room within; and an instruction that this fact will prevent a recovery for an injury to a passenger resulting from the negligence of the street car company is error. The court said: "Whether one leaves the car, after entering, to ride upon the platform, or whether he steps upon the platform without entering, is of no consequence. His act is as voluntary in the one case as in the other, and the same rule must govern both. The record is entirely silent as to any regulations on the part of the defendant in this respect. But we cannot denude ourselves of the knowledge, which is alike common to all, that passengers are constantly riding upon these platforms with the tacit assent of the defendant, and without any protest, notice, or regulation. We must therefore determine the question with the fact before us that this use of the platforms is permitted by the defendant without objection. It is recognized as dangerous *per se* to ride upon the platform of the ordinary steam railway. This is apparent to any one, and the difference in danger between riding there and upon the platform of the street car is too obvious to require comment. Authorities discussing the question afford no light in the determination of this. In the presence of the fact that passengers are permitted to ride upon these platforms constantly, can courts hold them to be dangerous *per se*? If the railway companies considered them dangerous places, would they not take some means to notify passengers not to ride there, or to inform them that they did so at their own risk? It is certainly reasonable to presume that they would. That they do not consider them dangerous is further apparent from the fact that, when their cars are full, they stop them to take on more passengers, and thus invite them to ride upon the platforms. This appears to be their constant custom. It is evident that the public do not consider these platforms places of danger from the fact of their constant use. It is therefore difficult to see upon what reasons courts can hold that they are dangerous, and that persons who ride there assume all the risk, and thereby relieve such companies from all liability except for gross, willful, and wanton misconduct. Under the facts shown by this record, the question of the negligence of the plaintiff, as well as of the defendant, belonged to the jury to determine, and should have been submitted to them under the proper instructions. Such in my

judgment, is the rule established by the clear weight of authority. *Nolan v. Brooklyn City & N. R. Co.*, 87 N. Y. 63, 3 Am. & Eng. R. Cas. 463; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Germantown Pass. R. Co. v. Walling*, 97 Pa. St. 55, 2 Am. & Eng. R. Cas. 20; *Meesel v. Lynn & B. R. Co.*, 8 Allen (Mass.), 234; *Burns v. Bellefontaine R. Co.*, 50 Mo. 139; *Railroad Co. v. Renz*, 55 Ga. 126; *Seigel v. Eisen*, 41 Cal. 109. This is not in conflict with the case of *Downey v. Hendrie*, 46 Mich. 498, 8 Am. & Eng. R. Cas. 386, where the plaintiff went through the car to the front platform and sat on the driving bar, a thin iron rail not exceeding an inch in thickness, from which he fell under the car. We have no doubt of the correctness of that decision. It is within the power of street railway companies to prohibit passengers from riding upon the platforms, or to give notice that those who ride there must do so at their own risk, or to limit the number of passengers which each car shall carry, and to require them to ride inside the cars. Until they adopt some such regulations, and notify the public, it is but reasonable to hold them liable for injuries, resulting from their own negligent acts, to their patrons, who are themselves in the exercise of reasonable care, whether riding upon the platforms or within the cars."

Passenger Going on Platform in Fear of Disaster—Contributory Negligence—Evidence.—Section 484 of the Cal. Civil Code, protecting a railroad company from damages for an injury to a passenger received on or from the platform of a car, in violation of printed regulations posted in the car, or of verbal instructions to the passenger, is intended to prevent the imprudent act of standing or riding on the platform, and neither the statute nor the regulation has any application where a passenger is justifiably entering or leaving the cars when injured. Where, therefore, at the time the accident occurred, the plaintiff was standing on the platform of the car, and his testimony showed that he had gone there immediately before the accident, in fear that some disaster would occur because of the speed of the train, and that he intended to jump therefrom to the sand, but that the car was overturned as soon as he reached the platform, it is a question for the jury whether the attempt thus made was an unreasonable or rash act or was one which a person of ordinary care and prudence might do under the circumstances. The facts, that the passenger was injured in an attempt to escape from an expected accident, and that those who remained in the car escaped without injury, are circumstances to be considered by the jury in determining whether the injured party acted as a man of ordinary prudence; but where he has acted with reasonable prudence, upon the probabilities of an effort to escape, it cannot be said that the attempt to escape constituted contributory negligence, nor does the inquiry depend upon the result of the attempt to escape. In such a case, it is error to exclude evidence of the actions of other passengers, who remained in the car, and as to whether or not any of them were injured. Such evidence is competent as a part of the *res gestae*, to show what they deemed prudent conduct. But such error is cured by the admission of undisputed evidence showing that there were only a few passengers in the car beside the plaintiff, and that they all remained in their seats until the car was overturned, and all escaped unhurt. *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62.

NEW YORK, LAKE ERIE & WESTERN R. CO.

v.

BALL.

(New Jersey Supreme Court, June 1, 1891.)

Passengers—Riding in Baggage Car—Assumption of Risk.—A passenger, entitled to ride on a railroad train, and who was smoking, entered the forward compartment of a combination car, which was arranged for persons smoking. The car was the rear car of the train, and the rear compartment of it was arranged for the carriage of baggage. He found every seat in the smoking compartment occupied, and passed into the baggage compartment. There was a rule of the railroad company requiring those in charge not to permit passengers to ride in baggage-cars. But of this rule the passenger had no knowledge. He and other passengers had frequently before been permitted to ride therein without objection, and the conductor had accepted and punched their tickets while in that compartment, as he did on the occasion in question. By the company's negligence a train, proceeding in the same direction on the same track, ran into the rear of the train on which the passenger rode, and he was thereby injured. *Held*, that by taking his position in the baggage compartment, under such circumstances, the passenger took the risk of any injury from dangers inherent in the construction or use thereof for the purpose of carrying baggage; but that his conduct, even if it be considered as contributing to an injury received from extraneous causes, such as a collision, could not be deemed to have been negligent, and that a charge to that effect was not erroneous.

ON rule to show cause why a new trial should not be granted, the case having been tried in the Circuit Court, Essex County, before Judge DEPUE and a jury.

C. Parker, for the rule.

F. W. Stevens, *contra*.

MAGIE, J.—Ball, the plaintiff, was the holder of a ticket, issued by defendant, and valid for a continuous passage each way daily between Newark and New York, on the railroad of defendant, for the month of May, 1888. *Case stated.* On May 11th plaintiff, who was smoking, took a train at Newark, entered the smoking compartment of a combination car, and, finding all seats therein occupied, passed through it into the baggage compartment, which was at the rear of the same car. The car was the rear car of the train. When the train reached the west end of defendant's tunnel, it was stopped by signal, and held waiting the passage through the tunnel of a train on defendant's main line. While standing at that place, a train of the New York & Greenwood Lake Railroad Company, running by agreement on defendant's track, approached from the west, and ran into the rear of the

train whereon plaintiff was. He had remained standing in the baggage compartment since he had entered it, and was standing therein up to the moment of the collision, when he received serious injuries in attempting to escape therefrom. A verdict was rendered in favor of plaintiff for \$25,000. A rule to show cause why the verdict should not be set aside having been allowed, defendant's counsel now urges that it should be made absolute on one of three grounds, viz.: (1) That there was not sufficient evidence to establish defendant's liability for the injuries, but that, by the weight of evidence, such injuries appeared to have been caused either by mere accident or by the negligence of the employes of the New York & Greenwood Lake Railroad Company, without any contributing fault of defendant; (2) that, if defendant was in fault, plaintiff cannot recover under the circumstances proved; and (3) that the damages awarded were excessive.

With respect to the first point it appears that the jury were explicitly instructed that defendant's liability depended on their finding preponderating evidence of its having been at fault and negligent in causing or contributing to the collision whereby plaintiff was injured.

Defendant's
liability for
injury.

The instructions were unexceptionable, and the only question, therefore, is whether the conclusion of the jury lacks the support of the requisite evidence. My examination of the evidence has convinced me that not only could an inference of defendant's fault and negligence be legitimately drawn therefrom, but that such an inference was required by proof that amounted almost to demonstration. About 2,500 feet west of the rear of the train in which plaintiff was, the railroad of defendant is carried over the Hackensack river by a drawbridge. It was the duty of the bridge tender, an employe of defendant, to permit no train to pass east towards the tunnel until at least three minutes had elapsed since the last preceding train had passed in that direction. The train that carried plaintiff had been permitted to pass, and proceeded, with speed greater than usual, (because considerably behind time), to the western entrance to the tunnel, where it was stopped. Upon stopping, it was the duty of one of the trainmen to go back immediately with a flag to warn approaching trains. He had just stepped from the train with a flag in his hand when the collision occurred. It was proved that the colliding train approached and passed the Hackensack bridge without being arrested or held by the bridge tender. It proceeded thence to the point of collision at about its usual speed, being but little behind time. Taking into consideration the distance to be traversed and the speed attained, and assuming that the colliding train did not pass the

bridge until three minutes after the plaintiff's train had passed, the inference is irresistible that there was time to flag the approaching train. If so, the trainman whose duty it was to flag that train was negligent. It may be added that, if the inference be drawn that the colliding train was suffered to pass the bridge before three minutes had elapsed, the bridge tender, defendant's employe, was at fault. The verdict cannot be disturbed on this ground.

The next contention is that plaintiff, by his own conduct, has disabled himself from enforcing the liability which would otherwise arise from defendant's negligence. This is first argued on the ground that plaintiff, by taking and retaining his position in the baggage compartment, designed, not for the carriage of passengers, but of baggage, had quitted the protection of his contract for safe carriage. The written contract of defendant, evidenced by the ticket, was for a continuous passage. But it is now settled that a railroad carrier, by its acceptance of a passenger, as passenger, comes under an obligation to take due and reasonable care for his safe carriage, which obligation arises, by implication of law, and independent of contract, so that it may exist, although the contract of carriage is illegal, or there is no express contract of carriage. *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. Law, 169, 41 Am. & Eng. R. Cas. 187. It is unnecessary to determine in this case whether, and to what extent, the obligation to carry an accepted passenger with due care will be waived or discharged by the misconduct of the passenger in violating reasonable rules made by the carrier; for, while it appears that defendant had made a rule requiring its employes not to permit a passenger to ride in baggage-cars, it also appears, not only that plaintiff was not informed of the rule, but that the employes of defendant who managed this train had frequently before permitted plaintiff and other such passengers to thus ride, and on the trip in question the conductor of the train had accepted and punched plaintiff's ticket while he was in the baggage compartment. Had the employes then informed plaintiff of the rule, and requested him to retire to the place provided for passengers, it would doubtless have been his duty to yield to the request when he could do so with reasonable safety. But, in the absence of such information and request, the plaintiff, ignorant of any prohibitory rule, might well infer from the acquiescence and assent of the employes, implied both from previous custom and from the exaction of his ticket under such circumstances, that he was not violating any rule of defendant. He was not, therefore, a trespasser, and had not, by his act, put himself, as is claimed,

**Plaintiff's
contributory
negligence.**

beyond the pale of protection under defendant's obligation to carry him with due care. In this respect the view taken and applied by the trial judge in the trial of the case is not open to objection.

But it is further argued that plaintiff, by taking a place on the train not provided for passengers, but for baggage, contributed by his own negligence to the injury which he received. In the charge to the jury, the trial judge stated the law on this subject thus: "If a passenger, taking his place in a baggage-car, even with the consent of those in charge, is injured by reason of anything likely to happen by reason of the construction or of the use of the baggage-car for its appropriate purpose, he must abide the consequences." But he limited the effect of such negligence, in discharging the carrier from liability, to the injuries mentioned, viz., those received from causes springing from the peculiar arrangement and use of such car as a baggage-car; for he added that the rule above stated did not apply to the case in hand, because the plaintiff, under the circumstances disclosed by the evidence, could not be deemed to have negligently contributed to an injury received from extraneous causes. These instructions took from the jury the consideration of plaintiff's negligence, as contributing to his injury, and the verdict rendered thereon can only be supported if, upon such construction of the evidence as is most favorable to defendant's contention, it was so established thereby that plaintiff's act in riding in the baggage compartment was not negligent, or did not contribute to his injury, as to justify an instruction to that effect. In my judgment, it might have been left to the jury to say from the evidence whether or not plaintiff was impliedly invited to ride in that place. By defendant's acts he was invited to ride on the train, and, as he was smoking, in the compartment provided for that purpose. When that compartment had previously been filled with sitting passengers, plaintiff and others had passed into the baggage compartment, and ridden there without objection or remonstrance, and the conductor of the train had there recognized them as passengers entitled to ride on the train. On the morning in question the seats in the smoking compartment were filled, and vacant seats in other cars could only be reached by passing over the platforms of the moving train. These facts, which were uncontradicted, would, in my judgment, have justified the inference of an implied invitation to ride in the place plaintiff was. If such an inference were drawn, I think that negligence could no more be imputed to the act of taking and retaining that place than it could be to the act of taking a seat in a passenger car, so far as concerned

danger from causes extraneous to the car. If any invitation called him to a place of obvious danger from such or other causes, apparent to his senses, and to take which could only be done by a failure to exercise care for his safety, negligence might be imputed to him notwithstanding an invitation. If the place to which he was invited may or may not be prudently taken, a question for the jury would arise. *City R. Co. v. Lee*, 50 N. J. Law, 435. 34 Am. & Eng. R. Cas. 566. where a passenger, under similar circumstances, rode on the platform, and was there injured in a wreck of the train, it was held that a question for the jury arose, and a finding that the act was not negligent was supported. *Willis v. Long Island R. Co.*, 34 N. Y. 670. As will be seen, I do not think that danger from extraneous causes was at all apparent or obvious to one invited to the baggage compartment.

But the case in hand was put to the jury, not as a question of implied invitation, but upon the assumption that plaintiff occupied the baggage compartment merely with the consent and permission of those in charge of the train. This conclusion was necessary from the evidence, and the trial judge had a right to base instructions to the jury thereon. The instruction thereon was that, while plaintiff's act in riding in that compartment would have negligently contributed to any injury received from causes inherent in the construction and use of it as a place for receiving and carrying baggage, there was no contributory negligence to be imputed to that act in respect to injuries received from causes *ab extra*. Plaintiff's injury was admittedly thus received. Whether plaintiff, by taking a position in the rear compartment of a rear car, against which the first impact of a collision from behind must fall, contributed to his injury, might well be questioned, under the evidence. He was hurt in endeavoring to escape from the car upon observing the imminence of the collision. There is reason to infer that, had he remained, he might have escaped serious injury, and strong ground for concluding that, had he been in the smoking compartment, he might have been more seriously injured. The result of this collision would seem to indicate that the place in which plaintiff was, was not peculiarly a place of danger; for the force of the blow from the colliding train was transmitted to and did its more destructive work at other parts of the train. Again, whether plaintiff's position, if wrongful, was a contributing cause, or merely the occasion or opportunity of the injury done by defendant's wrong, may also be questioned. *Bish. Non-Cont. Law*, §§ 63, 64, 463.

But let us assume that the jury, had the question been submitted to them, might have found that plaintiff's act did con

tribute to his own injury, as a cause thereof. To exonerate defendant from liability for its negligence, which also caused plaintiff's injury, it is not sufficient that plaintiff, by his act, contributed thereto; but it must further appear that, in doing that act, he was at fault and guilty of what the law calls negligence. Negligence is the absence of that care for safety which the law exacts from him who seeks redress for an injury done him by the negligence of another. In this respect the law exacts such judgment respecting dangers and risks incident to the circumstances as a reasonable man would form, and such vigilance in observing the approach of danger, and such care in avoiding it, as a prudent man reasonably careful of his safety, would exercise. If from the evidence the jury might have drawn the conclusion that plaintiff was thus negligent, the trial was misconducted, for the question should have been left to the jury; but, if there was nothing in the evidence to warrant such a conclusion, the instruction complained of was correct. The circumstances under which plaintiff acted have been detailed. The question is whether, in acting under those circumstances, he can be deemed to have failed to exercise that judgment, vigilance, and care which the law required of him. Had plaintiff's injuries been received from the fall of trunks rightfully placed, from being struck by trunks negligently thrown in loading or unloading, or from other causes incident to the use of that compartment as a place for the carriage of baggage, it is obvious that his act in taking a place exposed to such risks would not meet the requirements of the law; for any reasonable man would conclude that such dangers were incident to that position, and prudence would require him to foresee and avoid them. Neglect in that respect would deprive him of any right to enforce liability on defendant for its negligence producing injury from such causes. But, as to dangers from causes *ab extra*, I entertain no doubt that the law does not require any consideration of them, under such circumstances. In respect to them, the risk was not dependent on plaintiff's position in the baggage compartment; the like risk would have existed in any car in a similar position in the train. As to such dangers, the circumstances called for and required no judgment, and a prudent man might well act without the least reference to them. As to injuries received from such dangers, his conduct could not be deemed to be negligent, and a verdict finding negligence therein could not be sustained. For these reasons, I find the instructions of the trial judge appropriate and correct, and the verdict cannot be disturbed on this ground.

Upon the last ground submitted, I have, however, come to

the conclusion that the verdict for \$25,000 cannot be sustained. It is plain that considerably over \$15,000 of this sum has been awarded upon anticipated future loss and injury to plaintiff. When the evidence relied on to sustain his view of the probabilities of his future is carefully examined, it fails to furnish any justification for such an award. Its excess is so great as to indicate that the conclusion of the jury was not based on the evidence. But the case has been thoroughly tried, and we are not disposed to force a plaintiff to a retrial, unless he deserves it. If he will remit all damages in excess of \$15,000, the verdict may stand; if not, the rule to show cause will be made absolute.

Contributory Negligence of Passengers Riding in Baggage, Mail and Freight Cars.—Mr. Patterson in his valuable book on Railway Accident Law, states the law upon this subject as follows: "It is contributory negligence in a passenger to ride in a baggage or other car, not intended for the carriage of passengers, save with the consent of the railway, provided, of course, that the position of the passenger was a contributing cause of his injury, and was, in itself, so dangerous a place that a man of ordinary prudence would not have voluntarily occupied it under ordinary circumstances. Baggage cars and luggage vans are not primarily intended for the carriage of passengers. It is, in case of accident to the train, dangerous to be in them, not only because they are in general coupled to the engine drawing the train, and preceding the passenger cars, but also because in case of derailment or collision, the boxes and trunks in the baggage car are violently thrown about. It is therefore not reasonable to hold the railway liable to one whose injuries have been caused by his imprudence in voluntarily riding in such car." *Patt. Ry. Accident Law*, p. 286.

Mr. Beach in his book, "The law of contributory negligence," takes a similar position. He says: "It is contributory negligence on the part of a passenger to ride in a baggage car, contrary to the rules of the company. The contract of carriage must be understood to be a contract to carry the passengers in a passenger car and the baggage in baggage cars. The passenger car is the place the company provides for the passenger. It is his duty to occupy that car, and to keep out of the other cars of the train. A failure to do this is negligence." *Beach, Contrib. Neg.* § 55.

And the position of these text writers is abundantly supported by the decided cases. Thus in *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160, 1 Am. & Eng. R. Cas. 79, it is held that a passenger riding in a baggage car, when there is room in the passenger coaches, is negligent, and if an accident happens in which, as the event shows, he would not have been injured had he remained in the passenger car, he cannot recover, although his negligence may not have contributed to cause the injury. And in *Houston & T. C. R. Co. v. Clemmons*, 55 Tex. 88, 8 Am. & Eng. R. Cas. 396, the rule is laid down that a passenger on a railway train, who, instead of occupying a coach provided for passengers, remains, without necessity therefor, in the baggage car, knowing the fact that he is in more danger there than in a passenger coach, and thus remaining, receives injury in the wreck of the train, which he would have avoided had he remained in the passenger coach, is guilty of contributory negligence, and cannot recover on account of injuries received under such circumstances.

In *Cody v. New York & N. E. R. Co.*, 151 Mass. 452, it appeared that a

passenger entered at a station, the smoking car of a train on a single track railroad and began to read and smoke. The train started before the arrival of a train due to pass it at that station, and he, noticing that fact after his train was fairly under way, and being apprehensive, from his knowledge of the running of the trains, that a collision might take place at any moment, went into a baggage compartment at the forward end of the car, and there stood with his hand upon the knob of the door prepared to jump, and did jump just before the trains collided, and was injured. *Held*, in an action against the railroad company, that the question whether he was in the exercise of due care or guilty of contributory negligence was properly submitted to the jury.

In a recent New York case, *Webster v. Rome, W. & O. R. Co.*, 115 N. Y. 112, it appeared that the plaintiff while being transported as a passenger by the defendant railroad company was injured by a collision. Prior to the occurrence of the collision, he left his seat in the passenger coach and went forward into the baggage car to smoke, and was there at the time of the collision. The evidence tended to show, that the baggage car was the safer place, and plaintiff's escape from sudden death was due to his presence there. The court instructed the jury that they should determine whether plaintiff being where he had no business contributed to the injury, and that if he did he could not recover. Also that the "question is simply whether his being in the baggage car at that time and under the circumstances in which he was, contributed to his receiving the injury which he did receive." *Held*, that the charge was as favorable as defendant could ask.

In *Jones v. Chicago, St. P. M. & O. R. Co.*, 43 Minn. 279, 44 Am. & Eng. R. Cas. 357, it was held that the fact that a passenger on a railroad is, when injured, in a baggage car, in which, by the rules of the company, passengers are not permitted to be, is not negligence on his part that will defeat his recovery, unless it contributed to or aggravated the injury.

The fact that the conductor of the train gives the passenger permission to ride in the baggage or mail car has an important bearing. Mr. Beach holds that such permission does not impose any liability whatever upon the company. Beach, *Contrib. Neg.* § 55. Judge THOMPSON, on the other hand, lays down the rule that the permission of the conductor is the permission of the company, and a passenger acting thereon is not negligent. *Thomp. Carriers of Passengers*, p. 262. The cases are conflicting. *Carrol v. New York, etc., R. Co.*, 1 Duer (N. Y.) 571, is cited by Judge THOMPSON to support his position. But the weight of authority is to the contrary. Thus in *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21, 1 Am. & Eng. R. Cas. 87, it is held that a conductor cannot in violation of a known rule of the company, intended for the safety of passengers, license a passenger to ride in the baggage car so as to make the company responsible in case of injury. And see *Hickey v. Boston, etc., R. Co.*, 14 Allen (Mass.), 429. And in Louisiana it is held that it is not within the scope of the employment of a baggage master connected with a train, but not shown to have been put in charge of the same, to invite or permit any person or persons to enter or ride on a coach of such train; and permission given under such circumstances cannot create the relation of carrier and passenger. The company is not liable to such person for injuries which they may receive, unless for negligence or tortious acts on the part of the company. *Reary v. Louisville, N. O. & T. R. Co.*, 40 La. Ann. 32, 34 Am. & Eng. R. Cas. 277. After the conductor has told a passenger that he must not ride in a car used for transporting theatrical properties, etc., it being a dangerous place, it is not necessary for him to repeat the warning, and the passenger remains there at his own risk. *Blake v. Burlington, C. R. & N. R. Co.*, 78 Iowa 57, 39 Am. & Eng. R. Cas. 405.

In a Maryland case it was held that where the evidence shows that postal clerks holding photographic commissions are entitled to ride as passengers on trains while on duty and in returning home, and that by the permission of the conductor, a postal clerk holding such a commission travelled while off duty in the mail car and was injured in a collision, he is not guilty of contributory negligence *per se* so as to defeat a right of action for his death, although there was greater risk of injury in the mail car, and he would have escaped injury if he had continued his journey in the smoking car where he commenced it. *Baltimore & O. R. Co. v. State*, 72 Md. 36, 41 Am. & Eng. R. Cas 126.

In *Higgins v. Cherokee R. Co.*, 73 Ga. 149, 27 Am. & Eng. R. Cas. 218, it appeared that the plaintiff was voluntarily on the train where he was injured, by the invitation of the conductor, made at his own request; he paid no fare, and none was expected from him; he selected an open flat car, on which he rode rather than in the passenger coach, and was in position where he was more exposed to accident from sparks and cinders than he would have been had he taken a seat in the closed coach. *Held*, that he was entitled to look only for such security as that mode of conveyance was reasonably expected to afford; and having voluntarily incurred the injury of which he complains, resulting from getting a cinder in his eye, he was not entitled to recover from the railroad, even if it were somewhat at fault.

FAVRE

v.

LOUISVILLE & NASHVILLE R. Co.

(*Kentucky Court of Appeals, May 16, 1891.*)

Passenger—Contributory Negligence—Hand Protruding from Window.—If a passenger receives injury by protruding his hand from the car window while the train is moving rapidly, he cannot recover.

Contributory Negligence—When Question may be Raised by Demurrer.—Though contributory negligence is a defense which confesses and avoids plaintiff's case, and must be affirmatively pleaded, yet, where the petition itself states facts showing that plaintiff was guilty of such contributory negligence as will defeat his recovery, the question may properly be raised by demurrer.

APPEAL from Court of Common Pleas of Jefferson.

Stone & Sudduth and *James P. Gregory*, for appellant.

Lyttleton Cooke and *W. Lindsay*, for appellee.

LEWIS, J.—Appellant stated in his petition, to which a general demurrer was sustained, substantially, that appellee agreed to transport in its passenger cars from

Case stated.

Louisville over a route and on roads of other companies described to the city of New York, state of New York, a military organization of which he was then a member; that while traveling in appellee's cars under the agreement mentioned, occupying in the usual manner a seat in one of them, he "allowed his hand to protrude a short distance, not more

than 8 or 10 inches, out of the window adjacent to his seat, not more than one minute, when by reason of the gross negligence of appellee in running its train at an unusual and dangerous rate of speed over a portion of the road where there were numerous dangerous obstructions, of which he, appellant, was ignorant, his arm came in contact, with an obstruction in immediate proximity to the railroad track, whereby it was broken and great suffering by him was caused," etc.

It does not make any difference in the legal aspect of this case at what rate of speed the train was running at the time; for the injury was not caused by defect of the railroad track, nor collision of the train with any ob-

Question presented.

ject, but by contact of appellant's arm with an object beyond the car in which he was seated, and off the track, which would have produced the same result even if the speed had been no greater than the usual rate at which through or fast passenger trains run. The simple case presented is that of a passenger negligently putting his arm outside a fast moving car in which he was seated, and letting it so remain until struck by some object, and, as a consequence injured and broken, which would not have occurred if he had kept his person entirely inside the car. As has been held by this court, contributory negligence is a defense which confesses and avoids the plaintiff's case, and must be affirmatively pleaded. *Railroad Co. v. Hoehl*, 12 Bush (Ky.), 41; *Kentucky R. Co. v. Thomas*, 79 Ky. 160, 1 Am. & Eng. R. Cas. 79. Still there is no reason why it may not be decided, on demurrer to the petition, whether, according to the facts stated by the plaintiff, he was guilty of such contributory negligence as to defeat his recovery. The rule recognized and applied by this court is that, if the plaintiff so far contributed to the injury complained of by his own negligence or want of ordinary or common care and caution that but for his con-

Contributory negligence—Decision on demurrer.

curring and co-operating fault the injury would not have occurred, he cannot recover. *Railroad Co. v. Hoehl*; *Kentucky R. Co. v. Thomas*. There are two exceptions to this rule. One is when the injury is intentionally done, or results from willful negligence of the defendant; the other is when the direct cause of the injury is omission of the defendant, after becoming aware of the plaintiff's negligence, to use a proper degree of care to avoid the consequence of such negligence. The first has no application to this case whatever, and the other can have none unless the servants of every railway company be required to keep constant watch over passengers in order to prevent an act so palpably dangerous as putting the head or arm outside a car in motion, which would

be unreasonable. *Railroad Co. v. Sickings*, 5 Bush. 1, was the case of a passenger who had his arm resting on the window sill of a moving car, the elbow protruding outward, when it came in contact with the leaning standard of a freight car standing on the switch track, but left so close to the main track that the standard rubbed against the passenger car window, striking and breaking his arm. In considering the question of the company's liability, many authorities were cited with approval in support of the doctrine that under like circumstances the passenger must be regarded as guilty of such contributory negligence as will deprive him of all right to claim compensation from the carrier for injury occasioned. But the following language was used in that case: "The voluntary situation of appellee's arm at the time of the injury must in law be deemed gross negligence which contributed to the injury, and which will preclude him from any right of recovery, unless he can show negligence on the part of the defendant or its agents or servants, and for whose conduct it is legally responsible." It now seems to us that, if the

Plaintiff has
no right to
recover.

doctrine expressly recognized by this court since that case was decided to be reasonable and just, and that so manifestly accords with the current of authority in this country, be adhered to, the plaintiff in this case, upon his own statement of facts, has no right to recover; for the rule of law that a party is precluded from recovering for an injury to which he so far contributed as that but for his own negligence and want of ordinary care it would not have happened, can upon neither principle nor public policy be relaxed or qualified in this character of case, even if the conduct of the other party could be logically considered in any case. Every person of ordinary intelligence traveling on a railroad well knows that human foresight cannot anticipate, nor human skill and care provide with absolute certainty against, accidents at all times, and under all circumstances, that result in personal injury and loss of life. The most that can be done is to lessen the risk as far as possible, by requiring each company to keep its road in proper condition and repair, to furnish proper and suitable machinery and cars, adopt salutary rules for and by its servants exercise skill and active vigilance in, operating its trains. But still it is obvious the safety of each passenger must of necessity depend in many cases measureably upon his own conduct, and the laws should therefore hold him to the duty of at least ordinary care and observance of rules made by the company for the security and safety of passengers. Besides, it seems to us public policy requires, because essential to the safety of railroad passengers generally, that it be clearly

understood and kept in the mind of each one as an incentive to caution and care, that he must suffer without compensation from the company for any injury caused by his own negligent and unnecessary exposure of person to danger, in putting his head or limbs outside a car in motion.

Judgment affirmed.

Contributory Negligence of Passenger Protruding Hand or Arm from Car Window.—See *Georgia Pac. R. Co. v. Underwood* (Ala.), 44 Am. & Eng. R. Cas. 367; *Moakler v. Willamette V. R. Co.* (Ore.), 41 *Id.* 135, note 143.

Contributory Negligence of Passenger Sitting on End of Open Coal Car.—In *Jackson v. Crilly* (Colo. March 13, 1891), 26 Pac. Rep. 331, it was held that a passenger on an excursion train who seats himself on the rear end of an open coal car, not exceeding 2 1-2 inches in thickness, with his feet elevated by being placed on the seat directly in front of him, and with no possible opportunity of protecting himself in case of a sudden jolt of the car, when he might have found a safe seat in an adjoining car or stood up in the car in question, is guilty of contributory negligence as a matter of law; and, in an action for his death, caused by falling from his seat while the train was in motion, it is error to submit the question of contributory negligence to the jury.

Contributory Negligence of Passenger Going on car Before Regular Time.—In *Hodges v. New Hanover Transit Co.* (N. Car. Dec. 22, 1890), 12 S. E. Rep. 597, it appeared that the defendant's railroad was used mainly for carrying passengers to a seaside resort. The plaintiff was one of a party which had gone there for the day. The cars were left standing by the platform with their steps 2 1-2 inches therefrom. A half hour before the time for the train to start on its return trip, the plaintiff went, with others, to get on the cars, and she fell between the step and the platform. The cars had not been lighted and prepared for the reception of passengers, and it was then quite dark at that place. Held, that there was no evidence of negligence on the part of the defendant, and that the plaintiff was guilty of contributory negligence. The court said: "The defendant was not, as contended, bound at such a place, and under such circumstances, to fence in or inclose its platform and cars and trains to keep people from going on them, nor to keep a servant by them to warn people not to go on or about them. Persons (passengers) ought not to have gone on them, except at the regular time, and in the regular way, for the purposes of going on the return trip. They went on them at other times in their own wrong, and at their peril, in the absence of some default on the part of the defendant that was in and of itself dangerous. No default of that character appeared from the evidence. The accident seems to have been wholly attributable, and to have been attributed, to the want of light at the place where the plaintiff went on the car, and fell. It was incautious, imprudent, and negligence, gross negligence, of the plaintiff to attempt to go on the cars when she did, without having a light sufficient. She went, or attempted to go, on the cars without necessity, out of order, at the wrong time, and in the dark. The defendant was not bound to light the cars until within a reasonable time before the time fixed to start. At that place, it was reasonable and sufficient to light them, and give notice to prepare to start, 15 minutes before the time of starting. That would have given the excursionists ample time to get on the cars in order. It does not appear from the plaintiff's evidence that there was a dangerous opening between the edge of the platform and the steps of the cars; nor does it appear that she fell through an opening to the ground. The evidence is meager in

this respect, when she might have easily made it plain, and failed to do so."

In *Western Maryland R. Co. v. Herold* (Md. June 17, 1891), 22 Atl. Rep. 323, the plaintiff, a visitor at a sanitarium, finding the car which had been switched into the sanitarium grounds open, and other passengers therein, entered a few minutes before its leaving time. A boy loosened the brake and the car ran down a grade, and plaintiff jumped off and was injured. *Held*, that such act was not *per se* negligence, and the fact that the railroad and the sanitarium had a regulation prohibiting passengers from entering until an official announcement that the car was ready was immaterial, where such regulation was not published or posted, and plaintiff had no knowledge thereof.

Contributory Negligence of Boy Stealing Ride on Switch Engine.—In *Egley v. Oregon R. & N. Co.* (Wash. 1891), 26 Pac. Rep. 973, the action was brought against a railroad company for injuries to a boy of 9 years, while stealing a ride on the back foot-board of a switch-engine out of view of the engineer. It appeared that he was of ordinary intelligence, familiar with the working of a switch engine, and that he had been warned repeatedly by his father and servants of the company and others that he would get hurt if he went about the cars. He himself testified that he knew he might get hurt. *Held*, insufficient evidence to support a finding that he did not know it was dangerous for him to ride upon the engine. The fact that the company's servants failed to discover the boy was no evidence of negligence, especially when the company had issued a bulletin to allow no boys on the track, and its servants drove them away whenever they saw them there.

Injury to Person in Charge of Live Stock—Contributory Negligence.—At Minnesota Transfer plaintiff delivered to defendant a car in which was his horse, some furniture, and other property, to be transported over its line of road to Sauk Rapids, under a contract by which he agreed to load, unload, and reload, and to feed, water, and attend the stock, at his own expense and risk, while at the company's stock yards or on the cars; and he assumed the duty of securely placing the stock in the cars, and keeping the same securely locked and fastened, so as to prevent the escape of stock. The car arrived at Sauk Rapids in the night. The plaintiff left the car for a few minutes, and, on its being placed on a side track, returned to it, and laid down. Soon after, he was injured by an engine running against the car. *Held* that, although not then a passenger, yet, if prudent attention to his horse rendered it proper for him to be in the car, (and of that the jury is to judge), he was rightfully there, and defendant owed him a duty of care to avoid injuring him. *Orcutt v. Northern Pac. R. Co.*, 45 Minn. 368.

PEABODY

v.

OREGON RAILWAY & NAVIGATION CO.

(Oregon Supreme Court, June 24, 1891.)

Ejection of Passenger for Failure to Produce Ticket or Pay Fare—Attempt to Retain Seat—Expulsion by Force.—It is the duty of a passenger, if he has not the required ticket or token evidencing his right to travel on that train, although he has paid his fare to his destination to the conductor of another train who erroneously informed him that he could stop over, to

pay his fare or quietly leave the train when requested, and resort to his appropriate remedy for the damages he has sustained; and if he attempts to retain his seat without paying his fare, and is expelled by the conductor, using no more force than is necessary, he can recover no damages for the injury incurred by such expulsion.

Presumption that Company Owning Road Operates it.—When it is admitted that a railroad company is the owner of a railroad then being operated, a presumption arises that the same is operated by the company owning it, and the burden of proof is on such company to show to the satisfaction of the jury that such is not the fact.

APPEAL from Wasco Circuit Court.

W. W. Cotton and Snow & Gilbert, for appellant.

A. S. Bennett, for respondent.

LORD, J.—This is an action in tort to recover damages for the wrongful acts of the defendant's agents or servants in ejecting the plaintiff from one of its cars. There are mainly two questions presented by this record, *Case stated.* but the controlling one arose substantially out of this state of facts: The plaintiff, who is a stock dealer, had shipped stock from Grant's station to Portland, and had received from the railroad company a shipping contract which entitled him, upon the performance of certain conditions, to a passage from Grant's to Portland and return. Going to the office of the company earlier than its business hours, he was unable to get the ticket stamped, and otherwise perform its conditions so as to ride upon it, without taking a later train, so he went on the train then ready, and seated himself in the car. When the conductor came around for tickets, he presented to him his shipping contract, but it not being stamped, etc., as required, the conductor refused to receive it, and informed him that he must pay his fare, which the plaintiff did, giving the conductor a \$20 gold piece, from which the amount of his fare from Portland to Grant's was to be taken. At this time, according to his testimony, he asked the conductor if he would be allowed to stop over at The Dalles, and go to Grant's on the next train, to which the conductor replied that he could do so, and that it would be all right. The conductor, not being able to make the necessary change for the fare, after an absence of about 20 minutes, during which time he was engaged in taking up tickets, etc., returned with the change and a drawback check, which he delivered to the plaintiff. Upon the back of the drawback check was a receipt for the fare, but the check itself had printed upon it in large and legible words, "Good for this day and train only." The plaintiff does not seem to have given any attention to the check, or what was written or

printed upon it, but, acting upon the assurance of the conductor that he would be permitted to stop over at The Dalles, he did so, and, after remaining some hours, he took another train for the completion of his journey to Grant's. A short time after he entered upon this train, the conductor called upon him for his ticket, and he presented the drawback check and the receipt, which the conductor refused to accept, stating that it did not entitle him to ride upon that train, when he then explained to him the circumstances under which it was delivered to him by the other conductor, and claimed the right to continue his ride to Grant's station. The conductor told him that he was required by the rules and regulations of the company to collect fare, or a ticket entitling the passenger to ride, and that none of the papers which he had presented entitled him to ride on that train, and that, unless he paid his fare, his duty would require him to expel him from the cars. After waiting until the train had proceeded several miles and arrived at a station, the conductor informed him that, unless he paid his fare, he would be under the necessity of requiring him to leave the train. The plaintiff pointedly refused to leave or to pay his fare, when the conductor, finding he would do neither one nor the other, with the aid of the brakeman undertook to expel him from the car, which the plaintiff resisted with all his force, and manifested a disposition to fight, but when finally expelled from the train he tendered his fare, was received again on the train, and carried to his destination. His own evidence concedes that the duty of expelling was an unpleasant task to the conductor, and performed under the circumstances indicated. From this statement of the facts it is apparent that the plaintiff was without any proper evidence or token of his right to transportation on that train, other than his statements to the second conductor of the oral representations of the other conductor of such permission. Although a disputed fact at the trial, the conductor denying he ever made such representations or gave such permission, we shall assume its verity after verdict. Under such circumstances, was it the duty of the plaintiff when notified by the conductor that he could not receive the drawback check, to pay his fare under protest, or leave the train without rendering it necessary for the conductor to resort to force to secure his removal? The drift of the defendant's contention is that it is a recognized right of every railroad company to make such reasonable rules and regulations for the conduct of its business as may be necessary, and that it is a reasonable exercise of this right to require that every passenger shall, when

**Plaintiff
should have
paid fare or
left train
quietly.**

called upon by the conductor, present a ticket conforming to its reasonable rules and regulations, or, if he is unable so to do, that he shall pay his fare, but if he cannot produce the required ticket, and refuses to pay his fare, that he may be lawfully ejected from the train. In this view, as between the plaintiff and the conductor of the train from which he was expelled, unless he could produce the required ticket as evidence of his right to ride on that train, or in default thereof to pay his fare, the conductor would not be authorized to allow him to proceed to his destination on such train on his statement of the oral representations of the other conductor, inconsistent with the face of his ticket, and contrary to the rules and regulations of the company. To that conductor the ticket which the plaintiff produced was to be taken as conclusive evidence of his right to travel on that train, and, it failing, the conductor could not receive the statements of the plaintiff contradicting its plain terms, and allow him to retain his seat. Upon this assumption, when the plaintiff was unable to produce the required ticket evidencing his right to travel on that train, and refused to pay his fare or to leave the train when requested, stopped at a proper place, the conductor was authorized lawfully to expel him from the train, and the defendant is not responsible in damages for injuries incurred in resistance to such expulsion. Summed up, then, the considerations in support of the principle invoked are: That as between the conductor and passenger, the right of the latter to ride must be evidenced by some proper token or ticket; that neither the time nor the occasion is suitable for an investigation, whether of explanation, or representations of another conductor in conflict with the terms of the ticket, and contrary to the rules of the company: that it is better, under such circumstances, that the passenger comply if he is unable to produce the required ticket, and pay his fare, or leave the train quietly and suffer the temporary inconvenience which results, than that the business of the road be interrupted to the annoyance of the travelling public; that such a course would avoid all liability to unseemly struggles, often occurring in the presence of women and children, and prevent breaches of the peace, and at the same time secure the passenger ample redress in the remedies which the law provides. The application of this principle includes a variety of cases, as where the passenger is unable to produce any token or ticket as evidence of his right to ride, or the ticket which he does produce is irregular or defective, due to the fault or negligence of the agents of the company.

In *Frederick v. Marquette, H. & O. R. Co.*, 37 Mich. 342,

the plaintiff held an insufficient ticket, caused by the fault of the company's agent in delivering to him a ticket to the wrong station. He asked and paid for a ticket to a given station, and received what he supposed was such ticket, but which on its face was only good to a point short of his destination. In passing upon this question the court observed: "How then, is the conductor to ascertain the contract entered into between the passenger and the railroad company, where a ticket is purchased and presented to him? Practically there are but two ways,—one, the evidence offered him by the ticket; the other, the statements of the passenger contradicted by his ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind, and the benefit of a cross-examination. At common law, parties interested were not competent witnesses, and even under our statutes the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and cannot be procured. Yet here would be an investigation as to the terms of the contract where no such safeguards could be thrown around it, and where the conductor at his peril, would have to accept the statement of the interested party. I doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. As between conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as evidence of his right to the seat he claims. Where a passenger has purchased a ticket, and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him a wrong ticket, so that he has been compelled to relinquish his seat, or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration differing essentially from the one resorted to in this case." In *Townsend v. New York Cent. & H. R. R. Co.*, 55 N. Y. 295, the court say: "The question in this case is whether a wrongful taking of a ticket of a passenger by the conductor of one train exonerates him from compliance with the regulations on another on which he wishes to proceed upon his journey. I am unable to see how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train. * * *

Authorities supporting defendant's position.

The conductor of the train upon

which he was was not bound to take his word that he had had a ticket showing his right to a passage to Rhinebeck, which had been taken up by the conductor on the other train. His statement to that effect was wholly immaterial, and it was the duty of the conductor to the company to enforce the regulation as was repeatedly held by the trial judge by putting the plaintiff off in case he persistently refused to pay his fare. The question is whether, under the facts found by the jury, his resistance in the performance of this duty was lawful on the part of the plaintiff. If so, the singular case is presented where the regulation of the company was lawful, where the conductor owed a duty to the company to execute it, and at the same time the plaintiff had a right to repel force by force, and to use all that was necessary to retain his seat in the car. Thus a desperate struggle might ensue, attended by very serious consequences, when both sides were entirely in the right, so far as either could ascertain. All this is claimed to result from the wrongful act of the conductor of another train in taking a ticket from the plaintiff, for which wrong the plaintiff had a perfect remedy without inviting the commission of an assault and battery by persisting in retaining a seat upon another train, in violation of the lawful regulations by which those in charge were bound to govern themselves." In *Yorton v. Milwaukee, L. S. & W. R. Co.*, 54 Wis. 234, 6 Am. & Eng. R. Cas. 322, the plaintiff had purchased a ticket to the place of his destination, and asked the conductor for a stop over ticket, and, through the fault or mistake of the conductor, he received a trip or train check instead of a stop over ticket for which he asked, and which the conductor undertook to give him. The conductor of the second train refused to recognize it for fare, and demanded passage money or a ticket, which being refused, the plaintiff was ejected from the train. The court say: "Then the question arises, was the plaintiff entitled to ride on a subsequent train, not having the proper stop over check, or was the second conductor justified, under the circumstances, in putting him off the train when he refused to pay his fare? * * * He was perfectly justified in ejecting plaintiff from his train when plaintiff had no proper voucher, produced no sufficient evidence of his right to ride thereon, and refused to pay fare, and he himself was ignorant of the transaction between plaintiff and Conductor Sherman, [the first conductor.] It seems to us there was no other course for him to pursue under the rules of the company, for he was certainly not bound to take the plaintiff's word that he had paid his fare, and that Sherman had made a mistake in not giving him a stop over check. It is apparent that the right of plaintiff to ride on the train

without a proper voucher, and the right of the second conductor to eject him for want of said voucher, were inconsistent rights. Each could not co-exist at the same time. Mistake or fault of the conductor in not giving him, on request, such a check, would not give him a lawful right to ride on the second train, though he might require damages against the company for the wrongful act of the first conductor." In *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 16 Am. & Eng. R. Cas. 386, the court say: "It is no hardship upon the passenger to put upon him the duty of seeing to it in the first instance that he receives and presents to the conductor a proper ticket or check, or, if he fails to do this, to leave him to his remedy against the company for a breach of its contract. Otherwise the conductor must investigate and determine the question as best he can while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case." See also, *Mosher v. St. Louis, I. M. & T. R. Co.*, 23 Fed. Rep. 325, 21 Am. & Eng. R. Cas. 283; *Hall v. Memphis & C. R. Co.*, 15 Fed. Rep. 57, 9 Am. & Eng. R. Cas. 348; *Petrie v. Pennsylvania R. Co.*, 42 N. J. Law, 449, 1 Am. & Eng. R. Cas. 258; *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 618, 34 Am. & Eng. R. Cas. 290; *Chicago, B. & O. R. Co. v. Griffin*, 68 Ill. 499; *Shelton v. Lake Shore & M. S. R. Co.*, 29 Ohio St. 214; *Louisville & N. R. Co. v. Fleming*, 14 Lea, 128, 18 Am. & Eng. R. Cas. 348; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 18 Am. & Eng. R. Cas. 339; *Prince v. International & G. N. R. Co.*, 64 Tex. 146, 21 Am. & Eng. R. Cas. 152; *Hufford v. Grand Rapids & I. R. Co.*, 53 Mich. 118, 18 Am. & Eng. R. Cas. 336; *Downs v. New York & N. H. R. Co.*, 36 Conn. 287; *Jerome v. Smith*, 48 Vt. 230.

On the other hand, the contention for the plaintiff is that when he paid his fare from Portland to Grant's, upon the representation and promise of the conductor that he could stop over at The Dalles and ride upon the next train, and the conductor delivered to him a drawback check with a receipt for the money indorsed on the back thereof, and that, in pursuance of such agreement and promise, he, having stopped over, and then gone upon the second train without notice of any contrary regulation until after he commenced his journey, was not compelled to pay fare or leave the train, but that he was lawfully there, and might stand upon his rights, and, if wrongfully ejected by the conductor, he could recover damages for any injuries which he suffered in consequence of such ejection. Upon the facts there is no doubt but that the plaintiff had no knowledge of the rules or regulations of the company, and, as the agree-

Contention
for plaintiff.

ment for a ticket with the right to stop over was made before the ticket was delivered, the plaintiff cannot be deemed to have assented to any part of the contract expressed by the ticket different from that made with the conductor. As he wished to make his journey over the road on different trains to accommodate his business engagements, the conductor must be supposed to have known what the rules and regulations required in respect to the matter upon which he desired information. He was the person appointed by the company to impart the information asked, and to sell and deliver to him a ticket as evidence of his right to ride. This agent assures him that he can pay his fare to Grant's station, and that he can stop over at the place designated, and the plaintiff, relying upon his representations, pays his fare. His ticket is not delivered to him immediately for want of change, and not until some 20 minutes after his contract or understanding of permission to stop over was made, showing that he parted with his money in reliance upon the contract made or permission given, and not upon a ticket which he had not seen, expressing different terms, or terms inconsistent with his right to pursue his journey upon the next train. When the ticket was delivered to him, supposing that it is sufficient, or that the conductor whose duty it was to furnish it would deliver one conforming to their engagement, and relying upon his contract as made, he puts the ticket into his pocket without observing its terms, or that it expressly limits his right to ride on that day and train only, and stops over at The Dalles; and when he commences his journey on the next train, and his ticket is demanded of him, he is informed by the conductor that it is insufficient, when he explains to him the contract he made with the other conductor, and that he is on that train in pursuance of his assurances and contract, but the second conductor refuses to receive his explanations, and demands of him the payment of his fare, or the alternative of leaving the train, both of which he refuses to do, claiming that he is lawfully upon the train, and resisting with force his expulsion from it. Under such circumstances, the plaintiff contends that the contract established the relation of passenger and carrier, and, if the ticket furnished by its agent was insufficient to notify the second conductor of his right to travel on that train, that it was the negligence of the other conductor, and that he, being without fault, had a lawful right to travel on that train, and might resist his ejection, and, if ejected, he could recover damages for any injury which he suffered by reason of such ejection.

In support of this contention numerous authorities are cited, to which it is not possible to make full reference. Perhaps

as strong a case as any is *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, which like the case at bar, was an action in tort for the expulsion of the plaintiff from the cars of the defendant. By some negligence of the company's agent the plaintiff's ticket was not stamped or signed as required by the conditions of the ticket and the regulations of the company. He presented the ticket for his fare, but it was refused by the conductor, and for his expulsion the court held that he could recover "his proper damages of all sort," and among other things saying: "The company could no more be heard to say that an error was committed by its agent, resulting in a breach of duty on its part to the plaintiff, than it can be heard to say that an error was committed by its own action. * * * He [the plaintiff] had a right to assume that all these agents understood their duties and would perform them; and, if he performed his, he could stand upon his contract, and upon his relation as a passenger which the contract generated." In *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63, 26 Am. & Eng. R. Cas. 264, the plaintiff had gone upon one of the trains of the company with a proper ticket, and the conductor canceled it by mistake, but afterwards attempted to correct it, and assured the plaintiff that it would be all right, and that he could ride upon it on the next train in that condition. It was not properly corrected, and when the plaintiff went upon the returning train and presented the ticket the conductor refused to take it, and the plaintiff, refusing to pay his fare or leave the train was expelled therefrom. The court says: "The return coupon was canceled through the mistake of the conductor. This error he attempted to correct, and informed plaintiff that it was all right. The latter had a right to rely on this assurance, and that the ticket for which he had paid his money entitled him to return to Wilmington. If the servants of the appellant, under such circumstances, laid their hands forcibly upon the plaintiff, and compelled him to leave the car, there was not merely a breach of contract on the part of the company, but an unlawful interference with the person of the plaintiff and an indignity to his feelings for which an action will lie, and for which he is entitled to be compensated in damages. Such is the well-settled law of this state and of this country. The mistake by which plaintiff's ticket was canceled was the mistake of the appellant's servants, and it must abide the consequences." In *Hufford v. Grand Rapids & I. R. Co.*, 64 Mich. 631, 28 Am. & Eng. R. Cas. 129, the plaintiff purchased in good faith of the ticket agent a genuine ticket, issued by the company, which the agent had a right to sell, covering the distance between two

Authorities
supporting
plaintiff's po-
sition.

stations, and was informed by the agent that it "was good, and entitled him to ride between said stations." The court say: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out that it was not true, no matter what the ticket contained in words, figures, or other marks. See also, *Toledo, W. & W. R. Co. v. McDonough*, 53 Ind. 289; *Burnham v. Atlantic & St. L. R. Co.*, 63 Me. 298; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Palmer v. Charlotte, etc. R. Co.*, 3 S. Car. 580; *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 11 Am. & Eng. R. Cas. 109; *English v. Delaware & H. Canal Co.*, 66 N. Y. 454; *Tarbell v. Northern Central R. Co.*, 24 Hun (N. Y.), 53.

In the case at bar, the plaintiff never had any valid ticket or evidence of his right to ride or travel on the train from which he was expelled. His ticket was not even apparently valid on its face when offered, and is not within the principle or reason of some of the cases cited in support of his contention. That he had paid his fare to his destination, and that the conductor represented that he might stop over at The Dalles, may be admitted, but the ticket he received furnished no evidence of that permission, was inconsistent with it, and when offered it was after the right, according to its terms, had expired to travel upon it. It is not the case of a passenger with a valid ticket entitling him to a ride on the train, from which he was ejected, or with such a ticket as he was required to have, and by some mistake or fault of the conductor wrongly canceled, as in *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63, 26 Am. & Eng. R. Cas. 264; or surrendered to the proper agent of the company on demand, and receiving back what the agent believed to be the proper evidence of a right to ride on it, and when presented to the other conductor refused, despite the explanations offered, as in *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 384, 11 Am. & Eng. R. Cas. 109; or as in *Toledo, W. & W. R. Co. v. McDonough*, 53 Ind. 293; or where the ticket appears upon its face to be good, although not a regular ticket, but which the ticket agent assures the passenger is sufficient, after his attention has been recalled to it, and is afterwards refused by the conductor on the train, as in *Hufford v. Grand Rapids & I. R. Co.*, 53 Mich. 118, 18 Am. & Eng. R. Cas. 336, 64 Mich. 631, 28 Am. & Eng. R. Cas. 129; or where the plaintiff has paid his fare, and the same conductor to whom he paid it asks for it again, and insists, unless it is paid, that he would put the plaintiff off, and the latter refusing to pay, is forcibly

Cases distinguished.

ejected from the train, as in *English v. Delaware & H. Canal Co.*, 66 N. Y. 454; or where the plaintiff was not guilty of any negligence in accepting his ticket, but carefully examined it, saw everything there was on it, and received explanation of the meaning of the punched holes, and assurances that the ticket in the condition in which it was would be good for the trip, and the conductor refused to receive it, as in *Murdock v. Boston & A. R. Co.*, 137 Mass. 298, 21 Am. & Eng. R. Cas. 268, and in some other cases cited which might be distinguished.

It is true that the principle announced in some of the authorities cited is in conflict with the contention for the defendant, and while I own some reluctance, it seems to me that the weight of authority and reason, as applicable to the facts as disclosed by this record, is that it is the duty of the passenger to pay his fare or quietly to leave the train when requested, if he has not the proper ticket, and resort to his appropriate remedy for the damages he has sustained; but that if he attempts to retain his seat without paying his fare, and is expelled by the conductor, he can recover no damages for the injuries incurred by the expulsion. This result will tend to avoid unseemly struggles occurring on railroad trains, usually filled with passengers, including women and children, and thereby prevent breaches of the peace, and at the same time will fully protect the passenger by making the company responsible for all damages resulting from any breach of its contract. It is not disputed that the business of ejecting the plaintiff was extremely disagreeable to the conductor, and that he made considerable effort to induce the plaintiff to pay his fare or peaceably to leave the train, but that the plaintiff not only insisted on being put off by force but resisted with all the force he could command. It is hardly necessary to say that no reference is intended to apply to agents of the company who act wantonly or willfully or maliciously, or that a trespasser upon a train can be treated in a willful, wanton, or malicious manner.

2. The motion for nonsuit was based principally upon the idea that the evidence for the defendant was the only evidence in the case, and that this so conclusively showed that the defendant had leased its road and ceased to operate it at the time of the injury that the court erred in submitting the case to the jury. The stipulation and pleadings admit that the defendant was the owner of the road. When it is admitted that a railroad company is the owner of a railroad then being operated, a presumption arises that the same is operated by

**Plaintiff
should have
paid fare or
left train.**

**Presumption
that company
owns road
operates it.**

the company owning it, and the burden of proof is upon such company to show to the satisfaction of the jury that such is not the fact. Thus in *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wis. 145, 19 Am. & Eng. R. Cas. 285, the court say: "When a railroad company owns a railroad in operation, bearing the name of the company, the presumption is that such company operates it, and in order to relieve itself from liabilities for injuries to persons upon such road, caused by the negligence of the employes operating the same, the burden of proof is upon it to show that it does not operate the same." Now, is it disputed but that at common law the general rule was, where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted their testimony was to be credited, and to have the effect of overcoming a mere presumption? "But this rule," as RAPALLO, J., observed, "is subject to many qualifications." *Elwood v. Western Union Telegraph Co.*, 45 N. Y. 553. Our Code provides that the jury "are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption, or other evidence satisfying their minds." Hill's Code, § 845, subd. 2. This seems to indicate, as was contended, that where a presumption arises in any case the jury are not bound to believe the declarations of a witness, or a number of them, contradicting the presumption, but that the credibility of such witness or witnesses then becomes a question for them, and, if they are not satisfied of the truthfulness of the evidence of such witnesses, they are not bound to believe it, but may find in accordance with the presumption. The execution of the lease is admitted, but the transfer and possession under it are disputed, and the establishment of that fact is dependent upon the testimony of Mr. Cookingham, and certain telegrams and circulars offered through him for that purpose. The lease itself purports to have been executed in April, 1887, and before the statute for its authorization had gone into effect; but, waiving this, the truth of the transfer and possession, which ought to have been clear and decisive, was vague and unsatisfactory. From the nature of the circumstances, and as Mr. Cookingham stood related to them, it was not possible for him to testify positively or distinctly as to this transaction. Nor do the telegram and circular relied upon to establish the transfer and possession, aided by the testimony of Mr. Cookingham, render the proof in that regard much more definite and satisfactory. Owing to their vagueness as applied to the subject matter in dispute, without his testimony they are of little value as evidence. Much that he testifies to is but hearsay, much mere conclu-

sions, and as to what may be regarded as relevant, it was for the jury to pass upon the weight to be given to his statements in respect thereto, and his credibility. Taking, then, into consideration the presumption and operation of the road from its ownership, and in additton thereto that the stock contract upon which plaintiff shipped his cattle and rode to Portland was drawn in the name of the defendant company, and signed by the agent, as the agent of the defendant, for that company; that the lettering upon its cars and tickets, drawback checks, and other writings, etc., were likewise in the name of the defendant company; together with the testimony of the plaintiff, keeping in mind that the jury are the judges of the credibility of the witnesses,—it would be difficult on this record to assign any just or legal reason to withdraw the case from the jury. Leaving out of view the question of credibility, before a withdrawal of a case from a jury can be justified, the facts of the case should not only be undisputed, but the conclusion to be drawn from them indisputable. But, whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them the case should be properly left to the jury. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.), 657. Upon this point we think there was no error in refusing the motion for nonsuit. But in view of the considerations already expressed the judgment is reversed, and the plaintiff remitted to his remedy in accordance therewith.

Ejection of Passenger who Refuses to Produce Proper Ticket or Pay Fare.—The authorities upon this subject are conflicting. The following notes and cases may be consulted: *Kansas City, M. & B. R. Co. v. Riley* (Miss.), and note, *ante* p. 476, 479; *McKay v. Ohio, R. Co.* (W. Va.), 44 Am. & Eng. R. Cas. 395; *Butler v. Manchester & L. R. Co.* (Eng.), 33 *Id.* 551, note 556; *Louisville & N. R. Co. v. Fleming* (Tenn.), 18 *Id.* 347, note 362; *Hays v. New York Cent. R. Co.* 18 *Id.* 363; *City, etc., R. Co. v. Brauss*, 18 *Id.* 324; note, 6 *Id.* 322; *International & G. N. R. Co. v. Wilkes* (Tex.), 34 *Id.* 331; *Murdock v. Boston & A. R. Co.* (Mass.), 21 *Id.* 268; *Memphis, etc., R. Co. v. Benson* (Tenn.), 31 *Id.* 112; *Hufford v. Grand Rapids, etc., R. Co.* (Mich.), 28 *Id.* 129.

LOUISVILLE & NASHVILLE R. CO.

v.

JOHNSON.

(Alabama Supreme Court, May 1, 1891.)

Expulsion of Passenger—Refusal to Pay Fare—Indecent Language.—By refusing to pay his fare when rightfully demanded, and by using indecent language, a passenger on a railroad train forfeits all right to remain there, becomes an intruder and may be rightfully expelled.

Same—Place of Expulsion—Intoxicated Passenger.—A railroad company is not liable for the death of a passenger expelled from its train, owing to his being run over by another train after he was ejected, although such passenger was intoxicated, but not sufficient to destroy consciousness, and the place where he was put off, with which he was familiar, was dangerous only to persons going unnecessarily on the track.

APPEAL from Cullman Circuit Court.

Jones & Falkner, for appellants.

W. T. L. Coffey, for appellee.

CLOPTON, J.—Appellee, as administratrix, sues to recover damages for the death of A. W. Johnson, alleged to have been caused by the culpable negligence of the employes of defendants. Plaintiff's intestate having taken passage on a train of defendants, and having willfully and persistently refused to pay his fare when asked, becoming boisterous, and using profane and very obscene language, clearly shown by the evidence, it became the duty of the conductor to protect defendants against such intrusion, and the passengers against insult and annoyance. The right of the conductor to put him off the train under such circumstances, does not admit of serious question. By refusing to pay his fare when rightfully demanded, and by his gross misconduct, deceased forfeited all right to remain in the car, and assumed the position of an intruder. The conductor was not required to have consideration for his convenience, and was authorized to stop the train and put him off at any point on the railroad, having reasonable regard for his personal safety. The company owed him no duty other than the duty it owes to any trespasser,—not to inflict intentional, reckless, or wanton injury. In exercising the right of expulsion, unnecessary force must not be used, nor must it be exercised at such time, place, and under such circumstances that serious injury will probably and naturally result;

Passenger
properly ex-
pelled.

for, if it ensues, this is the equivalent of intentional reckless, or wanton injury. Subject to these limitations and restrictions, the time, place, and circumstances are left in the discretion and judgment of the conductor. *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, 22 Am. & Eng. R. Cas. 402; *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 34 Am. & Eng. R. Cas. 290; *Great Western R. Co. v. Miller*, 19 Mich. 305; *McClure v. Philadelphia, etc. R. Co.*, 34 Md. 532; *Hutch. Carr.* § 590; *Ror. R. R.* 960; *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 37 Am. & Eng. R. Cas. 308; *Louisville & N. R. Co. v. Black*, 89 Ala. 313, 45 Am. & Eng. R. Cas. 38.

Time and
place of ex-
planation.

No right of recovery is or can be claimed under the original complaint, which proceeds on the theory that plaintiff's intestate was a passenger. The amended complaint, by the statement that his fare was demanded, and that he neglected or refused to pay it, impliedly conceded the consequent right to remove him from the train, and bases the liability of the defendants on the averments that the conductor put him off at a time and place and under circumstances seriously endangering his safety, and exposing him to imminent peril of life or limb from passing trains, and that he was run over and killed by one of defendant's trains. The time was about 6 o'clock in the evening, dark and raining; the place at or near the entrance to a cut from 200 to 250 yards long, about one mile from Wilhite, a station which the train had just left, also from the home of the deceased. On the right is a mountain or high hill, and on the left a creek, about 12 feet below and 30 or more feet from the railroad, but sufficient space on each side of the road to enable a person to avoid injury by passing trains. Between the cut and Wilhite are a trestle and two stock gaps. Deceased was familiar with the locality and the cut. He was intoxicated, but not so drunk as to be unconscious or stupefied; had the use of his mental and physical faculties. There was nothing in his manner to indicate to the conductor that he could not or would not avoid the danger of a passing train. A train was due about 30 minutes thereafter, and two others passed during the night. His body was discovered the next morning on the opposite side of the track, a short distance from where he was put off, badly mangled. He was not injured while being ejected, or by the train from which he was removed, or by exposure to any perils incident or peculiar to the time or place, disconnected from the passing of other trains. From the position and condition of his body it may be assumed that he was run over and killed by another train, and this the amended complaint avers. Under its averments, and on the evidence, the mate-

rial inquiry is whether putting him off at such time and place was the proximate cause of the death, or his own negligence or other intervening agency.

Drunkenness has been styled a self imposed disability, and men make themselves drunk at their peril. It does not excuse the omission to use the same care and prudence which is exacted of a sober man under the same circumstances. "The fact of the intoxication of the injured person at the time of the injury will not only not relieve from the consequences of his contributory negligence, but also, if his intoxicated state contributed to the happening of the injury, will be admissible in evidence as proof of contributory negligence." 2 Am. & Eng. Ency. Law, 751; Columbus & W. R. Co. v. Wood, 86 Ala. 164; Beach, Contrib. Neg. § 146. It appearing that plaintiff's intestate was not so drunk as to be unconscious of the peril attending the passing of trains, or unable to take care of himself, his drunkenness is not only not excusatory, but tends to show that he contributed to his own injury, by placing himself in the position of imminent danger in which he was found. Had he even remained on the side of the road where he was left he would not have been injured. The degree of intoxication, as also the other facts and circumstances, plainly distinguish this case from the case of Louisville C. & L. R. Co. v. Sullivan, 81 Kv. 624, 16 Am. & Eng. R. Cas. 390; which is cited and relied on by appellee's counsel. In that case the weather was intensely cold—several degrees below zero,—the ground covered with snow eight to ten inches deep, and the person put off stupidly drunk, unable to take care of himself or to travel. The probability was that he would remain wherever put, and the natural consequence that he would freeze, which in fact produced his injuries. Putting him off under such circumstances was considered gross negligence, and the proximate cause of his injuries. It is said in the opinion that the force, if not unnecessary, was used "under circumstances and at a time when the consequences ordinarily would be as injurious as when, in an attempt to remove a trespasser from his dwelling house, the owner should shove him from an upper story, or lead him into a pitfall or well, or when a person is pushed off a fast moving train,"—which made it reckless or wanton.

Effect of deceased's intoxication.

Railway Co. v. Valleley, 32 Ohio St. 345, is parallel. The party, who was drunk, but not stupefied, or unable to travel, was put off about 8 or 9 o'clock in the evening, and was found the next morning, about one-third of a mile from where he was put off, in a dying condition, and died a few moments after he was taken up. Being found near the track, badly

bruised and mangled, it was assumed that he was run over and killed by another of the company's trains. ASHBURN, J., said: "But if the propriety of the expulsion were doubtful, either because deceased's conduct did not justify it, or because his condition rendered it unsafe and dangerous in its consequences, still we must find that the death was the natural and proximate result of the expulsion before defendants can be made liable. How can this be said in the present case? Admit that the railroad track is dangerous to passers-by; admit that putting off, as was done, was placing him in circumstances of danger,—they were no more dangerous to him than they were to every man whose business or pleasure take him in the neighborhood of railroads. There was no unusual or extraordinary circumstance of danger in the whole transaction, if the man was able to take care of himself; and this he was. The mere putting off, therefore, was in no way connected with his death, except as he himself connected it, by reason of his intoxication, and for this he alone is responsible. The expulsion is not in any way the occasion of the catastrophe, either as a proximate or other cause, unless it is in some way attached or linked with the drunkenness. If this is the state of the case, he must have been so drunk at the time he was struck as to be unable to avoid the accident, which shows the intoxication to have been the proximate cause; and, whether it be the proximate cause, or a cause for which he alone is responsible, in either case the responsibility cannot be fastened upon defendant." These cases, above referred to, draw the distinction as to the circumstances under which an intoxicated person is put off the train, and when his drunkenness will be considered the proximate cause of his injury. Plaintiff's intestate being boisterous and unruly, using profane and vulgar language, making himself obnoxious to the other passengers, it was the duty of the conductor not to hesitate, but act promptly, using due discretion and judgment. Not being unconscious or in a stupor, and being familiar with the cut and road he was bound to know that other trains were expected, and that it would be dangerous to be or remain on the track. If the danger to which he was exposed consisted in his going upon the track, no place could have been found on the side of the road where he would not be exposed to the same danger. Left where passing trains would not injure him, without some intervening agency, if he afterwards wandered on the track, and placed himself in a position of peril, it was his own carelessness, resulting from his unfortunate condition, for which defendants are not responsible. His expulsion from the train cannot, under the evidence, be regarded as the natural and

proximate cause of his death, or as connected with it, except as he himself connected it by his voluntary intoxication. *McClelland v. Railway Co.*, 94 Ind. 276. The court should have given the affirmative charge requested by defendant. Reversed and remanded.

Expulsion of Intoxicated Passenger.—See *Atchison, T. & S. F. R. Co. v. Weber* (Kan.), 21 Am. & Eng. R. Cas. 418, note 428; *McClelland v. Louisville, etc., R. Co.* (Ind.), 18 *Id.* 260; *Lemont v. Washington, etc., R. Co.* (D. C.), 1 *Id.* 263.

Place at which Passenger may be Expelled.—See notes, 39 Am. & Eng. R. Cas. 421, 422; *Baldwin v. G. T. R. Co.* (N. H.), 37 *Id.* 126, note 128; *South Fla. R. Co. v. Rhoads* (Fla.), 37 *Id.* 100; *Louisville C. & L. R. Co. v. Sullivan*, 16 *Id.* 390, note 397; *Hall v. South Car. R. Co.* (S. Car.), 34 *Id.* 311; *O'Brien v. New York, etc., R. Co.*, 1 *Id.* 259, note 261; *Skillman v. Cincinnati, etc., R. Co.* (Ohio), 13 *Id.* 31; *Lake Shore & M. S. R. Co. v. Rosenzweig* (Pa.), 26 *Id.* 489; *Hardenburgh v. St. Paul, etc., R. Co.* (Minn.), 34 *Id.* 359; *Southern Kan. R. Co. v. Hinsdale* (Kan.), 34 *Id.* 256; *Hobbs v. Texas & P. R. Co.* (Ark.), 34 *Id.* 268; *Atchison, etc., R. Co. v. Gants* (Kan.), 34 *Id.* 290; *Wyman v. No. Pac. R. Co.* (Minn.), 22 *Id.* 402; *International & G. N. R. Co. v. Hassell* (Tex.), 21 *Id.* 315; *Hall v. Memphis, etc., R. Co.* (C. C.), 9 *Id.* 348.

Same—Stopping Place.—Under Comp. Laws Utah, § 2354, which provides that "any passenger who refuses to prepay his fare or toll on demand may be put off the cars at any stopping place the conductor or employe of the company may elect," the company has no right to eject a passenger for non-payment of fare except at a stopping place. *Nichols v. Union Pacific R. Co.* (Utah, Sept. 12, 1891), 27 Pac. Rep. 693.

SOUTHERN KANSAS R. CO.

v.

SANFORD.

(45 Kansas, 372.)

Passengers—Expulsion While Train is in Motion—Negligence per se.—Removing a trespasser from a train of cars when the train is moving very slowly, is not negligence or wantonness *per se*.

Same—Negligence or Wantonness Questions for Jury.—In cases of ejection of trespassers from trains in motion, the question of negligence or wantonness is usually a question of fact for the jury.

COMMISSIONER'S decision. Error from District Court, Johnson County.

George R. Peck, A. A. Hurd, and Robert Dunlap, for plaintiff in error.

A. Smith Devenney, for defendant in error.

STRANG, C.—This action was brought by the defendant

against the plaintiff to recover damages for an injury which he alleges was inflicted upon him by the agent of the plaintiff in ejecting him from its train of cars on October 11, 1887. The defendant was a passenger on the plaintiff's train from Kansas City west, on the evening of that day. When the conductor in charge of the train demanded his ticket he did not produce any, and refused to pay fare, and was put off of the train. At some time, either while being put off the train or after he was off, his ankle was sprained, and this action was brought to recover damages therefor. The case was tried by the court and a jury, and a verdict for the plaintiff therein returned for \$150, \$100 compensatory damages and \$50 as punitive damages. Motion for new trial was overruled.

The undisputed evidence in this case clearly shows that the defendant twice failed to produce a ticket, when his ticket was demanded by the conductor,—once before reaching the station at Argentine, and again before reaching Holiday; and each time he not only refused to surrender his ticket, but refused to tell where he was going, simply saying, in response to the inquiry of the conductor as to where he was going, "I guess I know where I am going." The first time he refused to surrender his ticket or tell where he was going the conductor directed him to get off the train at the next station, Argentine, which he failed to do. The defendant thus ceased to be a passenger on the plaintiff's train, and became a trespasser thereon, and especially so after he had the second time refused to surrender his ticket or tell where he was going, so the conductor could fix the amount of his fare; and the conductor had the right to put him off, at a station or between stations, only so he did not put him off at a dangerous place, nor use any more force than was necessary to eject him, or put him off with a wanton disregard of the consequences of his ejection. *Lillis v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 464; *Pittsburgh, C. & St. L. R. Co. v. Van Houten*, 48 Ind. 90; *Stone v. Chicago & N. W. R. Co.*, 47 Iowa, 82; *Hibbard v. New York & E. R. Co.*, 15 N. Y. 456; *Frederick v. Marquette, H. & O. R. Co.*, 37 Mich. 342; *Atchison, T. & S. F. R. Co. v. Gants*, 38 Kan. 621, 34 Am. & Eng. R. Cas. 290, and cases there cited. Was the defendant ejected at a dangerous place? This question must be answered in the negative. He was put off near the station, in sight of the depot, where the ground was level and smooth, he himself testifying: "I had pretty good footing from there on. I could see all before me. Pretty good road where I came." That is, it was a pretty good road from the place where he was put off to the

Plaintiff a
trespasser
and was prop-
erly ejected.

depot. There is nothing in the record that shows that the conductor assaulted the defendant, or used violence, or any more force than was sufficient to eject him. The evidence shows there was very little resistance. The defendant was led or pushed out of the car, and put off of the platform onto the ground, without much fuss or force. We think the evidence clearly shows that the defendant was at the time just enough under the influence of liquor to make him somewhat stupid when left to himself, and more or less contrary when aroused; unable to offer much resistance, and certainly not able to remember afterwards much about what transpired. Was the conductor guilty of negligence or wantonness in putting the defendant off, under all the circumstances of this case? A strong preponderance of the evidence shows that the train was standing still when the defendant was put off. The conductor says the train was standing still. The defendant also says it had stopped when he was put off. It is true, that he says, in answer to a leading question in his examination in chief, it was moving. But, having testified both ways, his evidence must be taken more strongly against himself, and under ordinary circumstances, his evidence against himself would outweigh the evidence of a mere witness in his behalf, contradicting him on this point. All the witnesses agree that the train stopped outside the switch, to allow the brakeman to turn the switch, and again, after it had run in on the switch, to let the brakeman get on. And it must be remembered that this stop was within 200 or 300 yards of the depot, where the train must stop again. Mr. Hodges, a passenger on the train, says the train was in motion when the defendant was put off. He says the train had stopped inside the switch; but he says it had started up again before the defendant was put off. He also says that the first thing he saw in connection with the ejection of the defendant was the conductor setting down his lantern and pulling the bell-rope to stop the train. That immediately thereafter he went out upon the platform at the rear end of the car to see what the train was stopping for; and, while there, he heard a noise inside, as though made by a shuffling of feet, and went into the car, and as he went in the conductor and the defendant were going out of the front end of the car; and that he did not see or hear anything further. He did not go out again, but says the train was in motion. The evidence also shows that the conductor stepped off from the platform onto the ground with the defendant. Under such a state of facts the ordinary mind would not long hesitate in reaching the conclusion that the train was standing still when the defendant was ejected; that he was put off after the train had run

in on the switch, and stopped, and before it had again started. It is hardly within reason to believe that, having stopped outside the switch, where the conductor says he would not put the defendant off because it was not a good place, and then, having run in on the switch and stopped, where it was a good place to put him off, that he waited until after his train had started to run up to the depot, not 300 yards away, and then pulled the bell-rope, and slowed his train up, and put him off. Under such circumstances, it is much more in consonance with reason to believe that Hodges was mistaken about the train being in motion when the ejection occurred, especially as he is directly contradicted on this point by the conductor and the defendant himself: and that the train was in fact standing still when the defendant was ejected.

But counsel for defendant remind us that the jury found for the defendant, and that, with no special finding in the case,

the general verdict is conclusive upon all questions upon which there was a conflict in the evidence. We concede this, though reluctantly under the evidence in this case, and are therefore confronted

with the question, was it negligence or wantonness *per se* for the conductor to put the defendant off from the train while it was in motion? As there is no finding of the jury as to how fast or how slow the train was moving when the ejection was made, we must, to sustain the verdict and judgment in this case, say that it is negligence or wantonness *per se* for a conductor to remove a trespasser from a train in motion, no matter how slow it is running. In the case of Atchison, T. & S. F. R. Co. v. McCandliss, 33 Kan. 366, 373, 374, 22 Am. & Eng. R. Cas. 296, this court held that "stepping from a train of cars in motion, to a stationary platform, or to the stationary ground, which is more dangerous, is not negligence *per se*;" and cited in support of that position: Galveston, H. & S. A. R. Co. v. Smith, 59 Tex. 406; Doss v. Missouri, K. & T. R. Co., 59 Mo. 27; Filer v. New York Cent. R. Co., 49 N. Y. 42; Georgia R. & Banking Co. v. McCurdy, 45 Ga. 238; Pennsylvania R. Co. v. Kilgore, 32 Pa. St. 292. The court also said in that case that "the same rule obtained in getting on a train while in motion," and cited Swigert v. Hannibal & St. J. R. Co., 75 Mo. 475, 9 Am. & Eng. R. Cas. 322, and Eppendorf v. Brooklyn City & N. R. Co., 69 N. Y. 195. It is held in that case that "the question of negligence in such cases is usually a question of fact for the jury, although sometimes, and under some circumstances, it may be a question of law for the court." So, where a trespasser is removed from a train of cars by the agents of the company operating the train, while a train is in motion, we

Expulsion
from moving
train not neg-
ligence *per se*.

think the question of negligence, of wantonness, of the amount of force used, and of the character of the place where the ejection took place, are usually questions of fact for the jury. Where the evidence shows the train at the time of the ejection is moving very slowly, it is not negligence or wantonness *per se* to put a trespasser off of the train. In this case the plaintiff below could not have recovered, except upon the theory that it was negligence or wantonness *per se* for the conductor to put him off of the train while it was in motion. It is difficult to say whether the court intended to instruct the jury that it is negligence or wantonness *per se* to remove a trespasser from a train of cars while in motion, because of the fact that the court coupled so many other conditions with the element of motion of the train in its charge. But we have no doubt the jury were led by the charge to believe that the plaintiff below had a right to recover if he was put off of the train while it was in motion, without regard to the rate of its speed. This is apparent from the verdict, since the evidence clearly shows that there was no other element of negligence or wantonness in the case: and to that extent we think the instructions misleading and erroneous. We also think some of the instructions refused should have been given. They stated the law correctly, and the matter was not covered properly by the instructions that were given. If it ever is a question of fact for a jury to say whether it is a wanton wrong to put a trespasser off of a train while in motion, then this case is such a one, for the evidence clearly shows that the train was moving very slowly, if moving at all, while the ejection occurred. The court should have submitted it as a question of fact, coupled with proper instructions in relation thereto, for the jury to say, if they should find the train was in motion when the defendant was removed therefrom, whether or not the train was moving at such a rate of speed as to render the removal dangerous. For the reasons herein given it is recommended that the judgment of the district court be reversed, and the case remanded for a new trial.

Negligence or
wantonness
questions for
jury.

PER CURIAM.—It is so ordered; all the justices concurring.

Expulsion of Passenger from Moving Train.—See *Kansas City, etc. R. Co. v. Kelly* (Kan), 34 Am. & Eng. R. Cas. 281.

Ejection of Trespasser from Moving Train.—Plaintiff was sitting on a box-car, which was standing in defendant's yard. An engine was attached to the car without his observing it, and the train was moved away. A person came to plaintiff, and ordered him to leave the train, using violent and threatening language, in consequence of which plaintiff leaped from the

car while it was in rapid motion, and was injured. The court instructed that if defendant's servant, within the scope of his employment, by peremptory order and threats, caused plaintiff to get off the car when it was dangerous to do so, defendant was liable. *Held* correct. Gulf C. & F. S. R. Co. v. Kirkbride (Tex. Feb. 3, 1891), 15 S. W. Rep. 495.

TOMLINSON

v.

WILMINGTON & SEA COAST R. CO.

(*North Carolina Supreme Court, Nov. 17, 1890.*)

Passenger—Expulsion—Exemplary Damages.—A passenger, wrongfully expelled from a train, cannot recover exemplary damages unless there is evidence of undue force, unnecessary rudeness, insult, malice or some willful wrong accompanying the act of expulsion.

THIS was a civil action, tried at the May term, 1890, of the superior court of Cumberland county before BROWN, J. The plaintiff was ejected from defendant's car by the conductor for refusing to pay an extra charge for neglect to buy a ticket at the station. The plaintiff testified in reference to the manner and conduct of the conductor at the time when he was compelled to leave the train, as follows, viz.: "I first offered twenty-five cents for a round-trip ticket. He refused. I then offered twenty-five cents for a single-trip ticket from Wrightsville to Wilmington. He refused, and demanded the extra charge for not having a ticket, which I refused to pay. I cannot state any word the conductor used. He did not touch me or McLaughlin. He used no insulting language. He stopped the train and told us we must get off, and we did so. I thought he was harsh and ungentlemanly." Question by the Court: "State any violent act or any rudeness or insult offered by the conductor." Plaintiff replied: "Conductor did not touch me, or use any improper language. Only told us we would be compelled to leave the train, or pay full fare demanded by him. We were made to leave the train near the place called the 'Commissary,' and walk to Wilmington." W. G. McLaughlin testified in behalf of plaintiff in reference to the same matter as follows: "Conductor said, if we did not pay regular fare, he would stop the train and put us off. Conductor did not use any insulting language, or touch either of us. He only said, if we did not get off, he would put us off. He told us not to get up behind the train. Conductor did not touch either of us. We got off after what he said. I thought he was harsh towards us. He did not use any profane or insulting language, spoke in usual voice, but

said repeatedly that we must get off, or pay regular fare demanded by him." The plaintiff offered no other testimony as to the manner, language, or acts of the conductor at the time of putting him and his companion off the train. The conductor testified in behalf of defendant in relation to the same transaction, among other things, as follows: "Plaintiff refused to pay twenty-five cents, and told me to put him off. I offered to pay fare for him. He said he did not want me to do so, and told me to stop the train, and he would get off. I stopped the train about one hundred yards from a small regular station. Many other persons got off at the same place. It was five miles from Wilmington. The company were selling to soldiers special tickets to soldiers in uniform at twenty-five cents, but the plaintiff had on no uniform, nor any soldier's ticket. The regular fare was twenty-five cents one way, and fifty cents for round trip." The plaintiff had testified that he had on militia or state guard uniform; that, after tendering 25 cents for a round-trip ticket, he offered to pay same amount for a single ticket, but the conductor demanded an extra charge for failure to get a ticket. It is not necessary to give the testimony of other witnesses introduced for the defendant. The plaintiff requested the court to charge that, if the jury believe the defendant put the plaintiff off its train unlawfully, they are entitled, if they see fit, to award such damages as in their opinion will compensate the plaintiff for his unlawful ejection, and may also add to that such other damages by way of punishment for the unlawful act towards plaintiff. The prayer was refused, so far as it relates to punitive damages. Upon the subject of exemplary damages, the court instructed the jury that in this case the evidence was not sufficient in any view of it to entitle the plaintiff to recover punitive damages. The plaintiff excepted to the refusal to give the instructions asked, and to that given, and assigned as error the refusal to charge that the jury might allow exemplary damages.

T. H. Sutton, for appellant,

E. C. Smith and *S. C. Weill*, for appellee.

AVERY, J.—The rule laid down by this court in *Rose v. Wilmington & W. R. Co.*, 106 N. Car. 170, was that, "where a passenger is unlawfully expelled from a railway train, he is entitled to recover the actual damages that he sustained therefrom, and if the expulsion is attended with undue force, or other aggravating circumstances calculated to humiliate the passenger or wound his pride or if the passenger be lawfully ejected, but undue force used, accompanied by fraud, or an exhibition

When exemplary damages are recoverable.

of malice, rudeness, recklessness, or other willful wrong, such exemplary damages may be allowed as the jury think are warranted by the facts." *Knowles v. Norfolk S. R. Co.*, 102 N. Car. 66; *Holmes v. Carolina Cent. R. Co.*, 94 N. Car. 318, 26 Am. & Eng. R. Cas. 190. We concur in the conclusion reached by his honor that the plaintiff was not entitled to recover in any view of the evidence, and it is needless, in support of our opinion, to do more than reproduce what has already been said by this court in one case and cite others sustaining the same principle. The fact that the plaintiff was wrongfully expelled places him in no more favorable attitude as a claimant of punitive damages than if he had been rightfully ejected, but in an unlawful and unwarranted manner or with undue force. It is an essential prerequisite to the acquisition of the right to recover exemplary damages for the wrongful expulsion of a passenger from a train that there should be evidence of undue force, unnecessary rudeness in the application of the force, or insult, malice, or some willful wrong accompanying the act of ejecting him, or causing him to leave the train. *Rose v. Wilmington & W. R. Co.*, *supra*, and authorities there cited. There is no error, and the judgment is affirmed.

Exemplary Damages for Expulsion.—In *Fell v. Northern Pac. R. Co.*, 44 Fed. Rep. 248, the plaintiff bought a ticket, and was told by the agent that he could ride on a particular train. The conductor had not been informed of the order to carry, and ejected the plaintiff on a dark night, while the train was running at a dangerous rate of speed. *Held*, that the case was a proper one for exemplary damages.

LAMPKINS

v.

VICKSBURG, SHREVEPORT & PACIFIC R. CO.

(*Louisiana Supreme Court, Oct. 1890.*)

Compromise of Law Suit—Validity.—It is essential to the validity of a transaction that the particular lawsuit which is to be prevented or put an end to should be specially mentioned in it.

Same—a Compromise is a Contract and, to have the force of things adjudged, it must be perfect and complete in itself, and nothing left for ascertainment by parol proof.

Expulsion of Passenger—Identity of Person Causing—Conductor or Third Person.—There being no dispute as to the fact of a passenger's having been ejected violently from a railroad train while running at a high rate of speed, by a person representing himself to be a conductor, and possessed of the paraphernalia of such officer at the time, and being actually engaged in taking fares of other passengers, a strong presumption is created that such person was in fact a conductor of the train. When this presumption is

aided by the positive and uncontradicted testimony of two witnesses who saw the passenger ejected, very strong circumstantial proof will be required to overcome it, and relieve the railroad company from liability.

APPEAL from District Court, parish of Bossier.

Wise & Herndon, for appellant.

Land & Land, for appellee.

WATKINS, J.—The defendant corporation is sued for damages for personal injuries sustained by the plaintiff by reason of his having been violently ejected from a passenger train on its road, about 20 miles east of the city of Shreveport, at about 9 o'clock on the night of November 10, 1888. Case stated. Claim is made for \$20,000, but on the trial the jury awarded \$7,500, and from a judgment to that effect the defendant has appealed. The defense is a general denial and a plea of compromise and payment. As admitted by the defendant's counsel in brief and argument, the facts developed on the trial, *i. e.*, in relation to the happening of the occurrence, are briefly these: On the night in question the plaintiff was a passenger on one of the defendant's excursion trains going east from Shreveport. Nine passenger coaches and one baggage-car composed the train. On this train were a large number of people, men, women, and children, returning to their homes from their attendance on the Shreveport fair. The plaintiff, while sitting on one of the steps of the rear platform of the fourth coach from the engine, was approached by some one who demanded his fare. He did not have his ticket in possession, but told this person that a gentleman on the train had his ticket, and asked time to get it. Thereupon this man pushed or shoved him off the train. The speed of the train was about 25 miles an hour, and by the fall the plaintiff's left leg was broken. He lay all night by the roadside, and was next day found, and carried to the Charity Hospital in Shreveport, whereat his broken leg was amputated, two days subsequently. Defendant's counsel makes no question of the fact that a gross and wanton outrage was perpetrated on the plaintiff by somebody, but he strenuously insists that the person who inflicted it was neither an officer nor employe of the company, and it is therefore in no way responsible for the injury inflicted, or the damages sustained. But, whatever may be the facts in the case as appertaining to its liability, he claims, and defendant's answer sets up, a compromise and settlement made with the plaintiff *pendente lite* as a bar to his demands and recovery of damages. Hence the defense is twofold: (1) A compromise and settlement; (2) a denial of defendant's responsibility for the unlawful act.

Of the effect of the compromise. On December 29, 1888,

this suit was filed, and on the 26th of June, 1889, the subjoined document was executed by the plaintiff, viz.:

**Compromise
invalid.**

"Form 1516. Vicksburg, Shreveport and Pacific Railway Company to Wm. Lampkins, Dr. Shiloh, La., June 26, '89. In consideration of the sum of one hundred and fifty dollars to me paid by the Vicksburg & Shreveport and Pacific Railway Company, the receipt whereof is hereby acknowledged, I hereby release and acquit said company of all claims by reason of injuries sustained by me west of and near Shreveport on the 10th of November, A. D. 1888, by jumping from train and having leg run over, the same being settlement in full of any and all claims I have against said company in consequence of, or in any way connected with, said injury, whether caused by negligence of said company or any of its employes. One hundred to be paid in cash down, and fifty dollars to be remitted to me on or before July 5, 1889. [Signed] WM. LAMPKINS. Witness to reading, signature, and payment: [Signed] W. F. LINDSAY." This is the document relied upon as a compromise, having the force of things adjudged, between the parties to the litigation. From the evidence it appears that this alleged transaction was negotiated by an agent or claim adjuster of the defendant. This agent sought the defendant at his residence near the village of Shiloh, in Union parish, several miles distant from the railroad and about 80 miles distant from Shreveport, where this suit was filed, and found him in his house, confined of his affliction. He then had a conversation with him about the accident, in the course of which he admits saying that "he thought it would cost the company something like \$100; that is, to bring men here. I told Lampkins they expected him with their witnesses when the case came up, and that both of the conductors would be there for the purpose of proving they were not the men who shoved him off the train, and establishing their innocence. * * * My whole object was to convince Lampkins that he could recover nothing in this suit." It is a noticeable feature of this instrument of writing that it contains no mention of the lawsuit that was to be compromised, and that, while the consideration is mentioned as \$150, only \$100 of this is specified as cash. The Code declares that "a transaction or compromise is an agreement between two or more persons who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing." Rev. Civil Code, art. 3071. "This contract must be reduced to writing." As a contract, it must, like all other contracts, be full and complete in itself; but, in respect to the

particular lawsuit to be compromised, this one is silent, and, as to the price agreed on, something was left to be done. For it is in proof that, when the time designated in the instrument for the payment of the deferred installment of the price had arrived, that amount was tendered to, and refused by, the plaintiff. It is evident that there was no perfect agreement, and the contract was incomplete. And soon afterwards we find Lampkins and a companion journeying to Monroe, the domicile of the company, seeking additional advice on the subject, and endeavoring to procure some more definite satisfaction in the premises. The Code provides that "a compromise entered into on documents which have since been found false is null *in toto*." Rev. Civil Code, art. 3081. It is likewise null if the contract was imperfect, and the terms misunderstood. To be valid as a transaction, this contract must be complete in itself, and nothing left to be established by parol proof.

Just previous to the filing of this suit, the following agreement was made and entered into between the plaintiff and his counsel, viz.: "Wm. Lampkins *versus* V., S. & P. R. R. Co. (No. 3,334.) In district court of parish of Bossier. Know all men by these presents, that I, Wm. Lampkins, having retained and employed the law firm of Land & Land to institute and prosecute to final judgment the above entitled suit for the recovery of damages against the said company for irreparable injuries inflicted upon my person, do hereby, as a further consideration of their services in said suit, renounce and waive my right to compromise said suit with said company, or to compromise the judgment that may be rendered in my favor in said court; and I do hereby constitute my said attorneys my special and exclusive agents to compromise said suit with said company, or to compromise any judgment which may be rendered in my favor against said company for damages for injuries inflicted on my person, provided any proposition of compromise should be made by said company, either before or after judgment. Done and signed this the 27th day of December, 1888. [Signed] WILLIAM LAMPKINS." On the trial of the case plaintiff urged this agreement in restraint of his right to make the compromise of the suit without first consulting his counsel. There is no doubt that, having employed counsel to bring the suit, it was the duty of plaintiff to first consult them before making compromise of the case; and no written covenant between them was necessary to consecrate this obligation. The plaintiff, being a young colored man, at the time suffering from the amputation of his leg, and under treatment, and not of a bright or intelligent mind, did not appreciate this obligation, and was

unmindful of it. Some six months after the suit was filed, and much of the written evidence had been taken, plaintiff's counsel served a copy of this agreement on defendant's counsel, that they might be fully apprised of plaintiff's argument, and renunciation of his right to compromise the suit. This notification was brought home to the claim agent just previous to the alleged compromise. He admitted his knowledge of it, and that he disregarded it, and gave plaintiff's counsel no notice of it. To say the least, this course of conduct was in exceedingly bad taste, and reprehensible in the extreme, and places the transaction in a doubtful light. We think it was altogether unjustifiable, and it cannot receive our approbation. If reputable attorneys are to engage in the prosecution of justifiable litigation, at great labor and expense, and are to have themselves thus surprised, and their cases turned out of court, by overzealous representatives of adverse parties at any time, and without notice, and have no redress, to borrow a Shakesperean phrase, "Othello's occupation's gone." Coming in this doubtful guise, we cannot enforce this alleged compromise. On the trial, and in open court, plaintiff's counsel tendered the defendant the sum of \$150, and by receiving it the *statu quo* would have been restored.

With regard to the identity of the person who shoved the plaintiff off the train, the principal controversy arises. Quite

a number of witnesses were interrogated on the subject; and, as is usual in such cases, there is a marked conflict of testimony. It is certain that plaintiff was approached by some one, purporting to be a conductor, who demanded his fare. Lampkins says that this person wore a cap, he thinks, and had a lantern in his hand and a pair of clippers. It was he who pushed him off the train. He said: "The man had on a cap, but as to the clothes I do not remember. I did not notice whether the man had brass buttons on his coat or not. It was tolerably light. The lantern was all the light I had to go by." On the platform of the car and quite near Lampkins, stood two other persons, who were eye witnesses of the whole transaction. One of them testifies as follows: "I saw the conductor coming through the coach taking up fares. He passed through the third coach from the engine, came out on the platform where I was standing, and collected fare—twenty-five cents—from me and John Horton. He [the conductor] went to Lampkins, and asked him for his fare, and he told him he did not have any fare; that there was a man in the cars that had his fare; that if he would allow him a little time he would get his ticket. He asked him about the third time for his fare, and then told him to 'get off here, then,' and

Identity of
person expelled
from plaintiff.

Lampkins seemed not to move. The conductor took his lantern off his arm, and set it on the platform of the car beside him, and then pushed and kicked him off. I and John Horton were standing there, and I said: 'There now, boss, you killed that man.' The conductor said: 'No; that did not hurt [the] d—s—b—.'” This witness further stated that the conductor went into the next car, taking up tickets, and soon afterwards returned, and asked him: “Do you reckon I hurt the d—s—b—?” and he replied: “I reckon so.” He said this man wore a cap, and carried a lantern, and had a pair of conductor’s clippers in his hand. This witness’ testimony is fully corroborated by that of his associate, who stood on the platform. The testimony of the plaintiff is to the same effect. Another witness testifies that, a “short while after leaving Shreveport, the conductor and porter came through the train, saying that, ‘We have put him off. We have never failed yet.’” Still another witness swears that he heard the conductor say he put Lampkins off the train. He subsequently modified this statement by saying he did not know who it was who made this remark. The defendant’s witnesses testified the two conductors who had charge of the train were not dressed in uniform, and the two conductors declared that they had neither punches nor clippers, and only one of them admitted that he carried a lantern. Other witnesses state that there was a party of four or five college cadets on the train, disguised as conductors, taking up fares from colored passengers. One of these witnesses swears that he saw these young men collecting fares from colored men that night. He says: “One of them handed me a pair of green spectacles, and asked me to keep them, so the conductor would not recognize him.” He said he knew the young man, and that he showed the tickets he had taken up. He said he went forward to the baggage car, and informed the conductor of their proceedings, and they came back through the train in search of the young men, but they failed to find them. But neither he nor the conductor states that he gave the conductor their names. This gentleman was a local agent of the defendant, and well known to the conductor. On the other hand, five witnesses of the plaintiff, all of whom were on the same coach with the plaintiff, state that they saw nothing of the kind. This witness of the defendant fails to connect those young men with the plaintiff in any way. The details of the occurrence, as related by the eye witnesses, clearly show that the plaintiff was not pushed off the train by any one of them. The man who pushed him off carried a lantern and a pair of conductor’s clippers. He was entirely alone. They saw him as he came through the car collecting

fares of the passengers. He then came out on the platform, and took up their fare, and called on the plaintiff for his. Afterwards he passed on into the next coach, and subsequently returned. He did not wear green spectacles. Neither of those cadets had a lantern or a conductor's clip-pers. It was quite dark when the train left Shreveport, and at 9 o'clock no one could see how to read a ticket out on the platform of the coach, where the plaintiff was sitting, that night, without the use of a lantern. Certainly, the appearance of four or five young men on the train taking up fares from passengers would have attracted general attention, and the defendant could have easily proven that fact by many witnesses, whereas he produced but one. It is hard to believe that any young cadet would have pushed the plaintiff off the train, in the manner described, just for the sake of a little sport, taking into consideration that the night was dark, and he was entirely alone. If, as stated, these four young men went through the train, and collected tickets from colored passengers, if before the conductor came into the coach, how was it that there were not a number of persons besides the plaintiff ejected from the train for failing to have their tickets? And, if this occurred after the conductor had passed through the train, how did it happen that passengers had tickets in their possession, as they were on their return trip home? Taking this statement in any light, we may say it appears utterly absurd. We feel convinced, from a careful perusal of all the evidence, that plaintiff was ejected from the train by an official or employe of the defendant, and that it is responsible to the plaintiff for the injury sustained by the loss of his leg, which was caused either by his fall from the train, or by the wheels of the cars passing over and crushing it.

The plaintiff is a young colored man, of 24 years of age. He has no money or property; is a laboring man, who would likely earn \$200 a year; and has a reasonable prospect of living 25 years. He makes claim for \$5,000 for physical pain and suffering; \$10,000 for the loss of his leg, and \$5,000 for punitive damages for a malicious and causeless act of the defendant's employe in pushing him off the train. After being pushed off the train, he lay on the ground, without assistance, from 9 P. M. of one evening until 8 A. M. of the following morning, when he was found by one of the persons who stood on the platform and saw him fall. The next day he was carried to the Charity Hospital at Shreveport, where his left leg was amputated two inches below the knee. He was under treatment for several months, and suffered great pain. Under these circumstances, we think he is entitled to the sum of \$4,500—of this amount, \$2,500 for the pecuniary damages sus-

tained in consequence of the loss of his leg, and \$2,000 for physical suffering—with legal interest from date of this decree. There are numerous elements of damages that have entered into our computation and assessment of the allowance which we have made, and which need not be mentioned here. But it is proper to observe that this case was tried before a jury, who heard all the witnesses, and gave consideration to their testimony, which is conflicting and contradictory. They saw the witnesses when they testified, and were better capacitated to place a just estimate upon their evidence than we are; and we regard their appreciation of it as justly entitled to great consideration at our hands, and consider that their verdict should not be lightly considered or hastily disturbed. In this case we find no warrant for reversing their conclusions. *Griffin v. Shreveport & A. R. Co.*, 41 La. Ann. 808, 40 Am. & Eng. R. Cas. 295. It is therefore ordered, adjudged, and decreed that the judgment appealed from be, and the same is, amended, and reduced to \$4,500, and that as thus amended same be affirmed, and the plaintiff and appellee be taxed with the cost of appeal.

ON APPLICATION FOR REHEARING.

Independently of the technical objections noted in the opinion, one avoidance of the compromise might well rest upon the ground of the undue influence exercised upon, and the unjust advantage taken of, the plaintiff, an ignorant, weak minded, and suffering negro, by the astute agent of defendant, who, though advised that the plaintiff's interests were under the protection of competent counsel, in whose favor he had renounced the power of compromise, avoided the counsel, and sought the plaintiff in the seclusion of his sick room, and, by working on his credulity and his fears, extorted his consent to an unconscionable bargain. We have stricken from the opinion the quotation of certain testimony which it now appears, though embodied in the record, had been ruled out. The error in no manner affects our conclusions. Rehearing refused.

LOUISVILLE, NEW ALBANY & CHICAGO R. CO.

v.

WOLFE.

(Indiana Supreme Court, May 23, 1891.)

Expulsion of Passenger—Use of Profane Language—False Charge by Conductor.—A railroad company cannot justify the act of a conductor in expelling a passenger from a train, who has paid his fare, on account of his having, in the heat of passion, when falsely charged by the conductor with failure to pay his fare, used profane language in response to such charge, in the presence of ladies.

Same—Injuries Caused by Passenger's Resistance.—Where a passenger is lawfully in a railroad car and has the right to be carried, he has the right to make reasonable resistance to the efforts of the conductor to expel him, and for such damages as he may sustain on account of his removal from the car while so resisting, the company is liable.

Same—Exemplary Damages may be given in an action against a railroad company, for the wrongful ejectment of a passenger, if malice and oppression are shown.

APPEAL from Harrison Circuit Court.

*Jewett & Jewett, E. C. Field and S. O. Pickens, for appellant.
Alex. Dowling, for appellee.*

OLDS, C. J.—This is an action by the appellee against the appellant for being wrongfully expelled from the appellant's train by its servants, with force and violence, under humiliating circumstances. Case stated. Issues were joined on the complaint by a general denial and answers in justification,—one alleging the non-payment of fare, and the other non-payment of fare, and the use of profane and indecent language, and that he was guilty of disorderly conduct. The appellee replied in denial to the answers in justification. There was a trial by jury, and a verdict in favor of the appellee for \$1,500 damages. The jury also returned answers to special interrogatories. Appellant moved for judgment on the interrogatories and answers, for a new trial, and to modify the judgment; all of which were overruled, and judgment rendered on the verdict. Appellant's counsel discuss three propositions: *First*, that appellee, by his conduct and language used, forfeited his right to be carried as a passenger, and appellant had the lawful right to eject him from the train; *second*, that the damages are excessive; and, *third*, that the court erred in the instruction given in relation to damages. The jury by their answers to interrogatories find

that appellee, on August 29, 1887, purchased a ticket at New Albany for passage on appellant's train from New Albany to Mitchell, Ind., and on said day he took passage on appellant's train for Mitchell, and, on demand of the conductor, surrendered his ticket. That the conductor demanded fare or a ticket twice before stopping the train to put appellee off, and the train was stopped not at a regular station or stopping place to put him off. That the train was stopped before any effort was made to eject appellee, and before he was put off the train he said to the conductor: "If you say I did not give you a ticket, you are a God damned lying son of a bi'ch." That the words were spoken in a loud voice, and there were ladies in the car at the time. That when the trainmen undertook to put the appellee off the train he resisted, and struggled, and attempted to hold on to the seats in the car, and while so resisting he was injured about the arms and hands, and this was all the physical injuries that he received. It is insisted that these facts entitled the appellant to a judgment, notwithstanding the general verdict, on the theory that the appellee, by the use of the profane and improper language in a loud tone, in the presence of the lady passengers, forfeited his right to be carried as a passenger, and the conductor had the right to stop the train and put him off. It is assumed in the argument that this finding of fact shows the appellee to have used this improper language before the train was stopped for the purpose of putting him off, but this assumption is not warranted by the finding. The finding is that he used this language "just before he was put off of defendant's train." We do not think it presents the proposition discussed by counsel, viz., that if a passenger delivers to a conductor a ticket or pays his fare, and afterwards the conductor calls upon him to again pay his fare, and disputes the first payment, and a dispute arises, in which the conductor demands fare, and the passenger refuses to pay it on the ground that he has once paid, but in his refusal he becomes boisterous, and is guilty of unbecoming conduct, or the use of vulgar, obscene, and profane language, he forfeits his right to be carried further, notwithstanding he has paid his fare; and the conductor may stop the train, and expel him without liability. From aught that appears in the finding in this case, the appellee may have conducted himself in a perfectly civil and gentlemanly manner until the train was stopped, and the employes of the appellant had taken hold of him, and a struggle ensued, and the appellee taken from his seat; and that it was just as he was about to be finally ejected from the car when he used the language. If such were the facts,—and

Use of profane language did not justify expulsion.

they may have been, from aught that appears from the finding,—it would present a very different case than if the language was used in the first instance; for in such a case as we have put it would be clear that the language used had nothing to do with the ejection from the train. It would be clearly apparent, under such a state of facts, that he would have been ejected without regard to the use of the language; but, conceding that the language was used before the train was stopped, it does not appear that he was ejected on account of the vile language used. It is undoubtedly true that a passenger, by a breach of decorum, either by his acts or his language, may forfeit his right to be carried as a passenger, and may be expelled from the train, notwithstanding he has paid his fare; and this may be true even if he be led to such breach by reason of an insult offered him by an employe of the company. A wanton insult or false accusation oftentimes causes a sudden outburst of temper, and the use of language which one in an instant after regrets, and feels the mortification more keenly than do those in whose presence it is uttered. One who utters the language in a heat of passion, caused by a sudden and wanton insult and unexpected charge against his truthfulness and honesty, must be dealt with with more leniency than if used deliberately, without provocation, or after reasonable time for second thought, and opportunity to bridle or control his passion. The fact that a false and slanderous charge is made in the heat of passion may be proven in mitigation of damages. If a conductor, after having received a ticket for fare from a passenger, should return to him, and falsely deny having collected his fare or received a ticket, and demand pay again, and it was refused, and the conductor should abandon any further effort to collect again the fare or threats of putting off the train, and the passenger, after having reasonable time to control himself, should persist in the use of profane or indecent language, to the annoyance of other passengers, he would no doubt violate his right to be carried; at least, if the unearned fare was tendered back to him; but the company cannot justify the act of the conductor in expelling a passenger who has paid his fare on account of his having, in the heat of passion, when he was falsely charged with the failure to pay, used improper language, such as was used in this case, in response to such false charge, even though it was heard by other passengers; the wrong committed by the passenger was provoked by the conductor. It does not lie in the mouth of the appellant to say: "True, you paid your fare. You had the right to be carried. But when the conductor falsely charged you, in the presence of the other passengers, with

not having paid your fare, and demanded that you again pay fare or he would stop the train and put you off, you became angry; you used improper language to the conductor in the presence of lady passengers." If the theory contended for by the appellant be the true one, then it would be an inducement for the employes of railroad companies, under such circumstances, to wantonly and purposely address the passenger in such a manner as to provoke him to the use of bad language or bad conduct as affording an excuse, in case he refused to pay a second time, to eject him from the train. The damages sued for accrue on account of an injury on the part of the employe of the appellant to the appellee. The offense committed by the appellee is against the other passengers. He was provoked to the commission of it by the act of the employe of the appellant in falsely accusing him, in the presence of the other passengers, of not having paid his fare. Certainly the company ought not to defend against the unlawful act of their agent on account of such unlawful act having provoked a breach of decorum, or even a breach of the peace, on the part of the appellee. It is true the language used was unjustifiable, and was an insult to those in whose presence it was uttered; but it is evidently the fact that this breach of decorum was provoked and caused by an insult offered by the conductor to the appellee in the presence of these same passengers; and we see no just reason why, under such circumstances, it should operate as a defense to appellee's right of action, and bar him from a recovery.

It is next contended that the verdict is excessive, for the reason that the jury find that all the physical injuries inflicted were caused by the appellee resisting, and that he cannot recover for the injury caused by his resistance. There is nothing to show that the jury did include any damages for the injury occurring by reason of appellee's resistance; but, the appellee being lawfully in the car, and having paid his fare, he had the right to be carried, and he had the right to make reasonable resistance, as he did by holding onto the seats; and he was forced loose and taken from the car; and for such damages as he sustained on account of such removal from the car the appellant is liable. *English v. Delaware & H. Canal Co.*, 66 N. Y. 454; *Southern Kan. R. Co. v. Rice*, 38 Kan. 398, 34 Am. & Eng. R. Cas. 316; *Lake Erie & W. R. Co. v. Acres*, 108 Ind. 548, 28 Am. & Eng. R. Cas. 112; *Chicago, St. L. & P. R. Co. v. Hol-
dridge*, 118 Ind. 281.

Some objection is made to the giving of the seventh instruction, and the refusal to give instruction 7 asked by appellant. We have examined these instructions, and think

there is no available error in the instruction given. It is evident the jury was not misled by any technical error in the language used, even if it is erroneous. **Exemplary damages.** The instruction relates to the right to give exemplary damages, and there was some evidence which, if true, authorized the assessment of exemplary damages. *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116. When the offense is not punishable by the criminal law, and malice or oppression mingle in the controversy, exemplary or vindictive damages may be assessed. What we have said as to the other alleged errors disposes of the question presented by the instruction refused.

It is further contended that a new trial should have been granted on account of accident and surprise on account of an absent witness. There is no diligence shown, no application for a continuance, and the evidence is merely cumulative. There is no error in the record. Judgment affirmed, at costs of appellant.

Expulsion of Passenger for Failure to Procure Ticket—Failure to Have Ticket Office at Station.—Under Rev. St. Tex. art. 4238, declaring the intersection of two railroads to be a depot where the companies must receive passengers, and § 4226, requiring passengers to be carried to and from such junctions on payment of the legal fares, and Sayles' Civil St. art. 4258b, § 9, requiring ticket offices to be open half an hour prior to the departure of trains, and authorizing a charge of only three cents a mile by the conductor if the offices are not so open, a company is liable for the ejection of a passenger from a freight train, who gets on at a junction where there is no ticket office, notwithstanding its rule that passengers without tickets cannot ride on such trains. *Eddy v. Rider* (Tex. Dec. 9, 1890), 15 S. W. Rep. 113.

Expulsion of Passenger Having Ticket Punched by Mistake—Misconduct of Conductor.—In *Johnson v. Northern Pac. R. Co.*, 46 Fed. Rep. 347, it appeared that plaintiff purchased a ticket for an extended journey, the latter part of which was over defendant's road. By mistake the agent punched the ticket so as to indicate that it expired on the day on which it was issued. The mistake was not discovered until she was on the first division of defendant's road, when the conductor, upon telegraphing to the head office, received orders to honor the ticket until further instructions. At the end of his division, when he left the train, he delivered her the telegram. The conductor of the next division, notwithstanding the telegram, and the evidence on the face of the ticket that it had been honored, telegraphed to the division superintendent, and received no answer, and meanwhile, from time to time, for several hours, worried plaintiff by making remarks calculated to disturb her, and make her realize the disadvantage of her situation, and showing a desire to be unduly familiar. Finally, about midnight, after she had been carried a great distance, he put her off the train. She had explained in her first conversation that she was far from home, her means were exhausted, and she was not able to pay her fare. *Held*, that plaintiff was entitled to recover damages for the expulsion and ill treatment, in an action on the contract represented by the ticket.

Expulsion—Tender of Fare before Train has Stopped.—Where a conductor is about to expel a passenger from a train, an actual tender of the fare made before the train is stopped, cannot be refused by the conductor, no

matter who makes the tender. *Ham. v. President, etc., Delaware & H. Canal Co.* (Penn. May 27, 1891), 21 Atl. Rep. 1012.

Person Desiring to be Ejected in order to Bring Suit.—In *St. Louis & S. F. R. Co. v. Trimble* (Ark. Sup. Ct., March 28, 1891), 15 S. W. Rep. 899, it was held that where a passenger enters a railroad train, expecting and desiring to be ejected, in order that he may bring a suit for damages, he cannot recover for wounded feelings and pain of mind.

Injury to Passenger after Expulsion—Contributory Negligence in Walking on Track—Intoxication.—Where one is ejected from a train, he is at liberty to walk on the track no further than is absolutely necessary to enable him to reach a position of safety, and it is his duty to adopt any means of egress from the track which should be made use of by a person of ordinary prudence for that purpose, and a disregard of that duty is contributory negligence. And where one is put off a train at a place from which he can, by ordinary prudence, discover and go upon a traveled road, his failure to leave the track will not be excused by reason of his partial intoxication or the influence of his companion. *Ham v. President, etc., Delaware & H. Canal Co.* (Penn. May, 27, 1891), 21 Atl. Rep. 1012.

Trespasser on Freight Train—Duty of Company to.—Where a person clandestinely enters a box car of a freight train of a railroad company, to beat his way over the road, he becomes a trespasser on said train, and the only duty the company owes him is not to wantonly injure him. *Hendrix v. Kansas City, F. S. & G. R. Co.*, 45 Kan. 377.

GEORGIA RAILROAD & BANKING CO.

v.

ESKEW.

(*Georgia Supreme Court, February 23, 1891.*)

Ejection of Passenger—Mistake of Conductor.—There was evidence from which the jury could infer that the plaintiff was wrongfully expelled from the train, and thereby denied the enjoyment of his legal rights as a passenger. It is no excuse for expulsion that the conductor made a negligent mistake as to the station indicated on the face of the ticket which the plaintiff had exhibited and surrendered to the same conductor.

Same—A Passenger need not Wait to be Forcibly Ejected if before or after the train reaches a certain station he is ordered by the conductor to get off at that station, the order seeming to be peremptory, and the passenger so understanding it, he may yield to the conductor's authority, and leave the train at the station indicated, though the conductor be not immediately present when this is done. In such case, if the passenger acts contrary to his own will, and in obedience to the conductor's command, he is correct, and is entitled to redress for his expulsion.

Same—Punitive Damages—Intention of Conductor.—Where punitive as well as compensatory damages are in question, the intention involved in the alleged tort is material. Whether the conductor intended to expel the plaintiff, or was misunderstood as to his purpose, was relevant evidence on the claim for punitive damages. The conductor was competent to testify as to what his intention really was.

Same—In Arriving at the Conductor's Intention the jury could consider that he remained silent on hearing the plaintiff remark, after he alighted from the train, "that it was hard to be put off and be compelled to pay one's fare."

Excessive Damages.—The cause of action being traceable to a mistake of the conductor, and not to his willful or intentional violation of the plaintiff's rights, a verdict for \$750 damages has the appearance of being excessive, under all the facts and circumstances in evidence.

Needless Effort and Exposure by Expelled Passenger—Damages.—A person upon whom a wrong has been committed is under obligation to lighten the consequential damages as much as he can by the use of ordinary care and diligence. This applies, in case of an expelled passenger, to the time and mode of travelling from the place of his expulsion to the station at which he was entitled to be set down. It applies also to fatigue, hardship, and injury to his health involved in reaching there. Though he could not be compelled to pay fare to avoid wrongful expulsion, after being expelled he could not recover damages for walking, and its consequences, when he might have reached the station more cheaply and expeditiously, and with less injury to his health, by riding on the same or a subsequent train, or by securing other conveyance; nor, as a general rule, could he recover for inconvenience, hardship, or injury to health originating after reaching the station to which he was entitled to be carried, or needlessly caused by walking and exposure before reaching there.

Compensation for Wounded Feelings, as well as punitive damages, should be adjusted to all the circumstances of the actual case.

ERROR from Rockdale Superior Court.

J. B. Cumming, and *A. C. McCalla*, for plaintiff in error.

H. T. Lewis, and *Geo. W. Gleaton*, for defendant in error.

BLECKLEY, C. J.—The learned counsel for the railroad company argued only four of the grounds of the motion for a new trial. To these our opinion will be confined.

1. That the evidence, construing it, as we are bound to do, most favorably for the prevailing party, warranted a verdict for some amount against the company, we have no doubt. The tickets surrendered to the conductor by the plaintiff and his brother were from Atlanta to Social Circle; and that the conductor could and would have known this, had he exercised due care in the transaction of his business, admits of no question. If by reason of his own negligent mistake he expelled the plaintiff at Conyers, an intermediate station, when the plaintiff was rightfully on the train and entitled to be carried to his destination at Social Circle, the expulsion was wrongful, and a breach of the legal duty of the company as a common carrier. A passenger who has paid for and supplied himself with a ticket in all respects valid and regular, boarded the proper train, conducted himself thereon in a proper manner, and surrendered the ticket to the company at its own request, cannot be required either to produce the ticket when again called upon for it, nor to pay fare as a condition of remaining upon the train, and being carried to the point indicated upon the ticket as the terminus of his route. He has no further concern with the ticket, and can lose none of his rights by

Illegal ex-
pulsion -
Mistake of
conductor.

any mistake made by the conductor in reading it, construing it, mingling it with other tickets, or disposing of it otherwise.

(a) Although the conductor neither used physical force to expel the plaintiff from the train, nor was immediately present when the plaintiff left the train at Conyers, yet it was in fact an expulsion if the plaintiff alighted against his own will, and as an act of obedience to the conductor's previous command. Nor does it matter whether the command was given shortly before the train arrived at Conyers, or after its arrival, provided it was or seemed to be peremptory, and the plaintiff so understood and treated it. There was evidence from which the jury could infer that the command appeared peremptory, and that the plaintiff yielded to it in good faith. While a passenger cannot avail himself of a formal order of the conductor, not meant to be absolute and final, as a pretext for leaving the train and grounding an action against the company for expulsion, yet, where the circumstances fairly warrant him in believing that the conductor means what he says, and he really does believe it, he need not wait for the employment of actual force against him, but may submit to the moral coercion of the conductor's authority, and may abandon the train as an expelled passenger. If conductors do not mean that passengers shall withdraw themselves from trains, they should not issue their commands prematurely. All passenger conductors are by statute invested with the powers of police officers while on duty upon their trains. Code, § 4586a. A passenger, whether right or wrong in any contention or misunderstanding with a conductor, is under no duty, legal or moral, to stand out until the conductor appeals to force for the execution of his commands. If the passenger obeys and thereby does an act to which his own will does not consent, he is coerced. *Georgia R. Co. v. Homer*, 73 Ga. 251, 27 Am. & Eng. R. Cas. 186. So far from being under a duty to resist, he would generally put himself in the wrong by offering resistance. For the sake of peace and good order, he ought to submit.

Passenger
yielding to
conductor's
authority.

2. Section 3066 of the Code reads thus: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." This section was applicable to the case as made by the evidence of the plaintiff below, and was properly given in charge to the jury. *Georgia R. Co. v. Homer*, 73 Ga. 252, 27 Am. & Eng. R. Cas. 186; *Railroad Co. v. Olds*, 77 Ga. 674. For

Punitive dam-
ages—Inten-
tion of con-
ductor.

this reason the intention of the conductor was for investigation and determination by the jury as an element affecting punitive damages. *Georgia R. Co. v. Homer, supra.* If the purpose of the conductor was misunderstood, and he really had no intention of expelling the plaintiff from the train, although he had used language calculated to produce that impression, there was no aggravating circumstance taking its character from intention, and therefore no aggravating circumstance at all, unless found in the act itself, considered apart from intention, and viewed in the light of the time, place, and manner of its commission. From the general tenor of the conductor's evidence, it is highly probable he would have testified, had he been allowed to do so, that he had no intention to expel the plaintiff at Conyers. We think the court erred in refusing to allow counsel for the company to ask the conductor "whether or not it was his purpose to eject plaintiff from the train." As bearing upon the question of punitive damages, this was a legitimate inquiry; and there can be no doubt that the conductor was a competent witness to prove what his intention really was. There were divers circumstances in evidence tending to show that he intended expulsion. His answer on oath that he did not would have been direct evidence to the contrary of what the circumstances, as indirect evidence, tended to establish. In deciding upon the question of intention, the jury should have had before them both the direct evidence, excluded, and the indirect, which was admitted. The company could not escape being affected by the conductor's intention, and, this being so, it should have been allowed to show what that intention was. If the plaintiff had afterwards waived any claim for punitive damages, this error of the court would have been immaterial; but as there was no such waiver, and as the amount of damages awarded by the jury was very large for such a case, we think the company is entitled to a new trial on this ground.

3. There was no error in charging the jury as set out in the thirteenth ground of the motion for a new trial, that, in determining whether the conductor intended to eject the plaintiff, the jury could take into consideration the remark made by the plaintiff after he alighted from the train, but in the presence and hearing of the conductor, "that it was hard to be put off and be compelled to pay one's fare," and the failure of the conductor to make any reply to it. The conductor admitted in his evidence that he heard the observation, and made no reply. He does not explain why he made none. If he had been misunderstood, he could easily have said so to the plaintiff in answer to the remark above quoted, and the

Remark of
plaintiff in
presence of
conductor.

jury might think it a legitimate inference from his silence that he was not misunderstood. True, the whole scene bears a different construction, but what it really meant was for the jury, and the court merely submitted it for their consideration. This was correct. But that it was correct makes it more clear that the court erred, as we have ruled under the preceding head, in not allowing the conductor to testify with reference to his intention; for if his silence at the time of the transaction would throw light upon it, why would not his direct statement under oath at the trial be receivable to show what it really was? The charge, it will be noticed, relates to actual intention,—the kind of intention which might aggravate the tort, and serve as a basis for punitive damages. To allow compensatory damages, it would not be necessary for the jury to find actual intention; it would be enough for them to find apparent intention,—that is, such manifestation of intention by the conductor as would justify the plaintiff in believing that he had made up his mind to expel the plaintiff, although he had no such purpose and was in fact misunderstood.

4. As a new trial is to be had, it is not absolutely necessary for us to decide whether the damages, assessed at \$750, were excessive or not. We are strongly inclined to the opinion that the amount is out of reasonable and Excessive
damages. conscientious proportion with the magnitude of the injury. Numerous instances tending to illustrate the question of excessive damages by actual cases are collated in 5 Am. & Eng. Ency. Law, p. 55 *et seq.*, but at last such case must be ruled chiefly on its own facts and special circumstances. In the present case there is no indication in the evidence, taking it altogether, that there was any willful or intentional violation of the plaintiff's rights on the part of the conductor. No doubt he was in error, and that he fell into error on account of his own negligence. It was his duty to know that the tickets which he took up from the plaintiff and his brother were for Social Circle, and his failure to know it and have the means of verification afterwards is without any reasonable excuse that we can discover in the record. Between the conductor and these two passengers there were probably three misunderstandings. He thought either that they got on the train at Stone Mountain, or with tickets for that point, and no further; they knew that they got on at Atlanta with tickets for Social Circle. He thought they claimed to have had and surrendered tickets for Greensboro; they were sure they did not tell him they had tickets for that station. He thought he had not ordered them in a final and peremptory way to leave the train at Conyers; they con-

strued his language as requiring them to do so. Without imputing perjury to any witness, the fact that two, if not all three, of these misunderstandings existed can be arrived at with a fair degree of certainty. Throwing all the blame on the conductor, and allowing the jury the fullest scope in the exercise of their discretion which the law recognizes, what are the elements of damage? They are—*First*, compensation for pecuniary loss, for necessary inconvenience and physical hardship, and for proximate injury to health; *second*, compensation for wounded feelings; *third*, punitive damages.

5. The direct pecuniary loss was the cost of going to Social Circle from Conyers by the first available and appropriate conveyance, together with the expense and loss of time incident to waiting for and procuring such conveyance. A person upon whom a wrong has been committed is under obligation to lighten the damages as much as he can by the use of ordinary care and diligence. To the extent in which his damages are increased by his failure to observe such care and diligence they are the result of his own negligence. Field, Dam. § 126 *et seq.*; 1 Sedg. Dam. 164 *et seq.*; Weeks, D. A. Inj. § 121; 1 Suth. Dam. 148. In such a case as this, where the only fault or mistake involved in the cause of expulsion was on the part of the conductor, it was not the duty of the passenger to pay fare to prevent expulsion. He was under no obligation, legal or moral, to purchase exemption from a threatened or impending tort, but could stand upon his legal rights, or waive them, according to his election. He could not be made a trespasser where he had a legal right to be and remain, unless he waived that right, and he could not be forced by the conductor or any other human power to waive it. He had purchased it with his money, it was a vested right, and not even the legislative power of the state could deprive him of it, or force him to yield it against his will; and to expel him from the train when he was not a trespasser, not otherwise at fault, was to commit upon him a tortious injury. To eject as a trespasser one who is not an intruder is not to make him a trespasser, but to become one yourself. Bish. Non. Cont. Law, 1096. But as soon as the act of expulsion was completed, the plaintiff became subject to the rule of diligence to which we have just referred. The expulsion was not at night, but in the afternoon. It affirmatively appears that he had money enough to procure transportation by the same train from Conyers to Social Circle, the distance being 21 miles. Perhaps he might be excused for not taking passage on that train, but, after spending the

Needless ex-
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passenger.

night at Covington, he still had money enough, and more than enough, to pay his way and that of his brother to the point to which the company ought to have carried them in the first instance, it being only 11 miles. It thus appears that the plaintiff was not obliged to walk in order to reach Social Circle, and, if he did so at a greater cost of money and time than he need to have expended in waiting for a train and going by railway, he was not without fault. His recovery on this item should be limited to what it would have cost him in money and time to reach Social Circle from Conyers by the cheapest appropriate means which he could have used in the exercise of ordinary diligence, unless he suffered further direct damage from detention or delay. For his time and expenses in continuing his journey beyond Social Circle no recovery can be had, for the reason that they are too remote. After reaching the destination to which the company was bound to convey him, his cause of action against the company, both as to time and money, was complete, and his recovery now should be the same as if the action had been commenced at that moment. If his damages were still accruing as he traveled on down the railroad upon foot one mile beyond Social Circle, and continued to accrue through the day's journey until he arrived at Madison, and still continued after he left the railroad at Madison and went through the country to where he lodged for the night, and then ran on till he reached his mother's house next day, we see not what would have stopped them had his final destination been New York or Boston, and he had gone there on foot before ceasing to run up the damages. Whether a common carrier shall pay more or less damages for failing to carry a passenger to a way station on its line cannot depend, as a general rule, on what occurs to the passenger after he passes that station. If the company makes him whole for what he has lost by delay and otherwise up to the time of reaching there, this is enough. Subsequent losses are among the contingencies of life, which each man must bear for himself.

6. As to inconveniences and physical hardship, compensation for these should be denied altogether if they were needlessly incurred; and they were needlessly incurred, in part at least, if the plaintiff and his brother could have reached Social Circle by waiting at Conyers or Covington for the next train, or if, with the means at their command, they could have procured conveyance and spared themselves the fatigue and exposure of proceeding on foot to Social Circle. *Morse v. Duncan*, 14 Fed. Rep. 396; *Chicago, R. I. & P. R. Co. v. Brisbane*, 24 Ill. App. 467. By walking voluntarily they

Damages for
inconven-
iences and
hardship.

could not entitle themselves to recover of the company more than it would have cost them to ride. And the same may be said as to the alleged injury to the plaintiff's health. If his health would not have suffered had he not walked, and if he was not obliged to walk in order to reach Social Circle, but chose to do so rather than spend his money, he can recover nothing for injury to his health. *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill. 391; *Francis v. St. Louis Co.*, 5 Mo. App. 7; *Chicago, R. I. & P. R. Co. v. Brisbane*, *supra*; *Louisville & N. R. Co. v. Fleming*, 14 Lea (Tenn.), 154, 18 Am. & Eng. R. Cas. 347. The line of distinction between these cases and such as *International & G. N. R. Co. v. Terry*, 62 Tex. 380, 21 Am. & Eng. R. Cas. 323; and *Spicer v. Lynn & B. R. Co.*, 149 Mass. 207, is very broad. With inconvenience, hardship, or hurt to his health, originating after the plaintiff left Social Circle, no matter what method of travel he adopted, the company would have no concern. Such remote incidents of his expulsion from the train at Conyers, in violation of a duty to convey him to Social Circle, but no further, would be too contingent to enter into the computation of his damages. Code, §§ 3071-3073.

7. Compensation for wounded feelings and to redress any indignity offered the plaintiff while upon the train as a passenger is for estimation by the jury; but not only the literal facts in evidence, but their actual effect on the emotions, should be regarded. What degree of mortification or humiliation was consciously experienced by the plaintiff? Was he cast down and made ashamed? What is the explanation of his not being silent on the subject after leaving the train, instead of calling attention to his grievance by a random remark in the hearing of the conductor and others who might chance to be within the sound of his voice? These are questions to be considered.

8. Punitive damages may be awarded in such a case if the jury think proper to allow them, but should be graduated with reference to the special circumstances. Among these circumstances is the singular fact that, before leaving the train, the plaintiff did not protest or remonstrate with the conductor against being denied his rights as a passenger. He made no distinct objection to leaving the train. Indeed, he must have seemed to the conductor to leave it hurriedly and almost willingly; and the remark that it was hard to be put off, and be compelled to pay one's fare, could well have been understood as a speech to cover retreat with a thin drapery of plaintive words after an unsuccessful attempt to beat the railroad out of a ride on imaginary tickets. This construc-

Compensation
for wounded
feelings.

Punitive
damages
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cording to cir-
cumstances.

tion would have been unjust, but might have been adopted by the conductor without any intention to do injustice. We have studied the evidence carefully, and it suggests as a probable theory that, after the misunderstanding arose between the passenger and the conductor, the passenger was not as helpful as he might have been in freeing the conductor from his mistake, and that he was less intent upon reaching Social Circle by that train than upon having a good case against the company. If this is a true theory, it ought to bar punitive damages altogether. It may or may not be true. A new trial, however, is ordered upon the one ground only, that of the excluded evidence. Judgment reversed.

Punitive Damages for Wrongful Expulsion of Passenger.—See *ante* Tomlinson v. Wilmington & Sea Coast R. Co. and note, pp 620, 621.

Excessive Damages for Wrongful Expulsion of Passengers.—In this note we collect the cases, showing what the courts have considered to be excessive damages, for which the verdict of the jury will be set aside, in actions against railroad companies for the alleged wrongful expulsion of passengers from trains; also, the cases showing what verdicts the courts have upheld.

\$100 not excessive where passenger on a freight train was compelled to get off at night, at a water tank about one quarter of a mile from a station. The passenger was lame and carried two heavy bundles. In order to reach the station, he had to cross a covered railroad bridge on a narrow foot path. Chicago, etc. R. Co. v. Flagg, 43 Ill. 364.

\$195 not excessive for the expulsion of a boy 16 years of age, who, after giving the conductor his ticket, had it demanded of him again. The conductor accepted ten cents, all the money the boy had, but ordered him to get off the cars before reaching his destination; the boy did so and was thereby compelled to walk the remainder of the distance. Indianapolis & St. L. R. Co. v. Howerton, 127 Ind. 236.

\$200 not excessive for feelings of humiliation and shame suffered by passenger who tendered a valid ticket, which was refused by the conductor, and who left the train at the next station to avoid forcible expulsion. Chicago, St. L. & P. R. Co. v. Holdridge, 118 Ind. 281.

\$200 not excessive where passenger was put off train in the night time, at some distance from the station. Illinois, etc., R. Co. v. Johnson, 67 Ill. 312.

\$50 excessive for ejection of passenger three miles from the station, and who, after waiting four hours, took the next train to his destination. Huntsman v. Great Western R. Co., 20 U. C. Q. B. 24.

\$400 not excessive for wrongful expulsion of passenger in the night time, not at any station or house, although the passenger was picked up when another train came along and carried to his destination. Toledo, etc. R. Co. v. McDonald, 53 Ind. 281.

\$500 excessive for expelling passenger from train in the night time, not at any regular station or stopping place. Illinois, etc. R. Co. v. Cunningham, 67 Ill. 316.

\$500 excessive for expulsion of passenger who refused to pay extra fare, but who alleged that he had been unable to procure ticket. The expulsion was at a regular station, and no actual force or insulting language was used, and no personal injury suffered. Finch v. Northern Pacific R. Co. (Minn. July 24, 1891), 49 N. W. Rep. 329.

\$500 not excessive where passenger was wrongfully expelled at midnight, was compelled to cross a bridge over a river in order to get back to the station, and was sick and lost two weeks' work. *International & G. N. R. Co. v. Wilkes*, 68 Tex. 617, 34 Am. & Eng. R. Cas. 331.

\$500 not excessive for expulsion of passenger for refusal to pay extra fare wrongfully demanded by conductor. The ejection took place at a station not the passenger's place of destination. *Du Laurans v. St. Paul, etc. R. Co.*, 15 Minn. 49.

\$562.50 not excessive where the passenger was expelled in a rough manner, accompanied with profane and unbecoming language. *St. Louis & S. E. R. Co. v. Myrtle*, 21 Ind. 566.

\$600 not excessive where the passenger, wrongfully accused of attempting to defraud company, was ejected in the dark, several miles from any station, and seven miles from his destination, obliging him to take a long walk and compelling him to endure considerable physical pain. The verdict was not excessive, even admitting that the passenger was entitled to compensatory damages only. *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 11 Am. & Eng. R. Cas. 109.

\$700 not excessive for expulsion of passenger wrongfully accused of not paying his fare, and treated with insolence, and put off the train in a rude manner in the night time, at a place where there was no station and in cold weather. *Indianapolis, D. & W. R. Co. v. Milligan*, 50 Ind. 392.

\$750 excessive for wrongful ejection of passenger, no inconvenience disappointment, or loss of time, being proved. *Houston & T. C. R. Co. v. Ford*, 53 Tex. 514.

\$800 not excessive where there was evidence that the act of the conductor in expelling plaintiff was wilful and malicious, and it appearing that the conductor was retained in defendant's employ after it had knowledge of his act. *Graham v. Pacific R. Co.*, 66 Mo. 536.

\$1,000 excessive for expulsion of passenger who offered without explanation, a ticket which was void by reason of having been punched. The passenger refused to pay his fare and was ejected, without any aggravating circumstances, three or four miles from a station. *Terre Haute v. Vanatta*, 21 Ill. 188.

\$1,000 excessive where passenger was ejected about eighty rods from a station, without violence or any aggravating circumstances. *Chicago, etc., R. Co. v. Parks*, 18 Ill. 416.

\$1,000 excessive where passenger was ejected with violence, his face being scratched, and the skin slightly abraded in one or two places on his limbs. *Chicago, etc., R. Co. v. Peacock*, 48 Ill. 253.

\$1,500 grossly excessive and out of all proportion to the injury received, where a passenger was expelled for refusal to pay extra fare, owing to inadvertence of agent in giving him a ticket to the wrong station. The passenger refused to leave the train, so that he had to be put off by force, but immediately got on board another coach, agreeing to pay the sum demanded. While making the change the passenger used grossly profane and abusive language in the presence of ladies. *Chicago, etc. R. Co. v. Griffin*, 68 Ill. 499.

\$2,600 excessive where the question was one of compensation only, and there was no malice on the part of the conductor. *Louisville, etc. R. Co. v. Wilsey*, (Ky.) 39 Am. & Eng. R. Cas. 418.

\$3,000 not excessive for expulsion of female passenger after train had passed her station, in a lonely spot, late in the evening, and accompanied with acts of insult calculated to enhance the damages. *Louisville & N. R. Co. v. Ballard* (Ky.), 10 S. W. Rep. 1049.

\$3,000 excessive for wrongfully expelling a passenger who had lost his ticket for a sleeping car berth, but gave satisfactory assurance that he had purchased the ticket. *Pullman, etc. Co. v. Read*, 75 Ill. 125.

\$5000 excessive for wrongful ejectment of a passenger over a quarter of a mile from the station where he had started, no more force being used than was necessary. The plaintiff was delayed one day, and had to purchase another ticket, at an expense of \$40.50. *Quigley v. Central Pac. R. Co.*, 11 Nev. 350.

\$6,500 not excessive for bodily and mental pain suffered by female passenger, by being wrongfully and rudely ejected by servants, using insulting and abusive language, on a cold dark night, in the swamp of a river, and in a strange country. *International & G. N. R. Co. v. Gilbert*, 64 Tex. 526, 22 Am. & Eng. R. Cas. 405.

\$8,000 not excessive for expulsion of female passenger who was on the wrong train by mistake of the defendant's agent. She was put off at night at a lonely place. She walked back to the next station, received severe injuries and suffered from fright. *International & G. N. R. Co. v. Smith* (Tex.), 27 Am. & Eng. R. Cas. 148.

LAFFITTE

v.

NEW ORLEANS CITY & L. R. Co.

(*Louisiana Supreme Court, Dec. 15, 1890.*)

Street Railroads—Torts of Servants—Liabilities of Company.—Street railroad companies are not liable for wilful and tortious acts of their servants committed outside of the scope of their employment.

Same—Same.—They are under obligations to carry their passengers safely and properly, to treat them respectfully, and, if this duty is intrusted to a servant, he is responsible for the manner in which he executes the trust. They must protect their passengers, not only from violence and insults of strangers, but *a fortiori* against the violence and insults of their own servants. In this case the company is held liable for the act of the driver causing the arrest of a passenger upon a false charge of passing counterfeit money.

APPEAL from Civil District Court, Parish of Orleans.

Buck, Dinkelspiel & Hart, for appellant.

Paul E. Theard & Sons, for appellee.

MCENERY, J.—The plaintiff sued the defendant company for \$20,000 for damages for abuse when in defendant's car, and for damages for malicious prosecution, and false arrest and imprisonment. There was judgment for the plaintiff for the sum of \$400, from which the defendant appealed. The facts are that on the 27th day of December, 1889, the plaintiff entered the street car of the defendant company. He handed to the driver of the car, through the change gate, one silver dollar for change. The

Case stated.

drivers of the cars are instructed to furnish change to the amount of two dollars to passengers. The driver returned to the plaintiff 95 cents, 15 cents of which he placed in the fare-box for himself and friends. There was some altercation about the change being short five cents. The driver gave the plaintiff five cents to make good the deficiency. After going several squares, the driver charged the plaintiff with having handed a counterfeit dollar to him, for which he had given him the change. The driver, in the hearing of the passengers, threatened to have the plaintiff arrested when he reached the station. He frequently looked at the plaintiff in a menacing manner, which attracted attention, and placed the plaintiff under suspicion. When the car reached the station the driver and the starter at the station had the plaintiff arrested by a policeman, and confined in prison for a short while. There was a charge of passing counterfeit money lodged against plaintiff. The prosecution was dismissed, as the dollar which it is alleged was counterfeit was a good coin. There is some conflict of testimony as to the exact point where the plaintiff was arrested. But we believe his statement is corroborated that he was arrested at the request of the driver by the policeman, in response to the "whistle,"—a signal for the officer which he blew before the car stopped, just as he was stepping from the car. The petition of plaintiff contains two causes of action,—one for abuse and defamation when in defendant's car, and the other for malicious prosecution. On the latter cause, the record does not show that the charge against plaintiff, and his consequent arrest, instigated by the driver of the car, was done in the exercise of the functions in which he was employed. The driver had no instructions to make arrest for the passing of counterfeit money. No inference of such authority can be drawn from the fact of changing money for passengers. He does this at his own risk and responsibility; the company loses nothing if counterfeit coin is accepted by the driver, as he is charged with it. It has no interest, therefore, in the arrest of the person attempting to pass counterfeit money, other than that which induces every citizen to make known crime when committed. It may be, as alleged by plaintiff, that the act was malicious, wilful, and tortious, but, as it was not done within the scope of the driver's employment, the defendant company cannot be held responsible in damages. *Rev. Civil Code, art. 2320; Williams v. Pullman Palace Car Co., 40 La. Ann. 88, 33 Am. & Eng. R. Cas. 407; Gerber v. Viosca, 8 Rob. (La.) 150; Ware v. Barataria & L. Canal Co., 15 La. 169; Dyer v. Rieley, 28 La. Ann. 6; Cooley, Torts, p. 536.*

Act outside
scope of em-
ployment.

The plaintiff was a passenger on defendant's street car line.

He had paid his fare to his destination. He behaved himself with propriety. He was not drunk or disorderly. The complaint against him for passing counterfeit money was groundless. He was subjected to insult and defamation by the driver in the presence of other passengers. If not subjected to arrest within the car, he was practically placed under surveillance by the driver from the time he was charged with passing the counterfeit dollar until he arrived at his destination. In the case of *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 88, 33 Am. & Eng. R. Cas. 407, we quoted from and approved of the law as expressed in the case of *Goddard v. Grand Trunk R. Co.*, 57 Me. 202. In that case the court said: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. He must not only protect his passengers against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants." *Id.* The same doctrine is laid down in the case of *Keene v. Lizardi*, 5 La. 431; also referred to and affirmed in the case of *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 88, 33 Am. & Eng. R. Cas. 407; *Mallach v. Ridley*, 9 N. Y. Supp. 922. There was no conductor on defendant's car. The driver was in exclusive control of the car, and charged with the safe delivery of the passengers. He was the only servant of the company to whom the passengers could look for protection. It is difficult to estimate damages to feelings and reputation. If the plaintiff was possessed of any pride, or had any regard for his character, his humiliation in the presence of others, when in defendant's car, must have produced the severest mortification. Under the facts presented in this case, it was the peculiar province of the jury to estimate the damages. In the case of *Griffin v. Shreveport & A. R. Co.*, 41 La. Ann. 808, 40 Am. & Eng. R. Cas. 295, we said: "While we are not bound by the findings of a jury, even on questions of fact or of damage, and do not hesitate to reverse them when manifestly erroneous or excessive, yet we give them the weight to which they are justly entitled, and do not lightly disturb them." The claim for damages for the false arrest and malicious prosecution did not go to the jury. Their finding was confined to the insult, abuse, and defamation while in defendant's car. We see no reason to disturb the amount awarded by the jury. Judgment affirmed.

Plaintiff entitled to damages for insult and injury.

Liability of Carrier for Injury to Passengers Through Tortious Acts of Servants.—See *Dwinelle v. New York Central R. R. Co.* (N. Y.), 44 Am. & Eng. R. Cas. 384, note 391, note 41 Am. & Eng. R. Cas. 239, note 40 *Id.* 648; *Dillingham v. Anthony* (Tex.), 37 *Id.* 1; *Quinn v. South Carolina R. Co.* (S. Car.), 37 Am. & Eng. R. Cas. 166, note 171; *Dean v. St. Paul Union Depot Co.*, 39 *Id.* 360; *Fick v. Chicago & N. W. R. Co.* (Wis.), 34 *Id.* 378, note 380; *Mykleby v. Chicago, etc. R. Co.* (Minn.), 34 *Id.* 387; *Sachrowitz v. Atchison, T. & S. F. R. Co.* (Kan.), 34 *Id.* 382; *Winnegar v. Central Passenger R. Co.* (Ky.), 34 *Id.* 462; *Williams v. Pullman P. Car Co.* (La.), 33 Am. & Eng. R. Cas. 407; *Williams v. Pullman P. Car Co.* (La.), 33 *Id.* 414; *Spohn v. Missouri Pac. R. Co.* 26 *Id.* 252, note 256.

Assault on Passenger by Street Car Conductor.—A railroad company is responsible to a passenger for a battery by the conductor, committed first on the car, and repeated shortly afterwards at the office of the company whither the passenger had gone to make complaint to the superintendent. The passenger having been badly beaten, kicked, cut with a knife, and his arm broken, a verdict for \$2,000 is not excessive. *Savannah St. & R. R. Co. v. Bryan* (Ga. Dec. 10, 1890), 12 S. W. Rep. 307.

Assault on Passenger for Refusal to Leave Moving Train.—In *Alabama G. S. R. Co. v. Frazier* (Ala. June 10, 1891), 9 So. Rep. 303, the plaintiff sued to recover damages for injuries alleged to have been wilfully inflicted on him by one of defendant's brakemen. It was held that although plaintiff got on a train knowing that no passengers were allowed on it, and though it was the duty of the brakeman to put him off, still if the latter, in the discharge of that duty, wilfully assaulted and beat plaintiff, merely because he declined to get off while it was running at a rate of speed rendering the attempt hazardous, the company would be liable for punitive damages.

Same—Evidence Res Gestæ.—In an action against a railroad company to recover damages for an assault inflicted upon the plaintiff by a brakeman in the employ of the defendant, the plaintiff testified that the assault was wilful and wanton, and without justification or palliation. According to defendant's evidence, it was committed under a reasonable apprehension of an immediate deadly attack by plaintiff on the conductor or brakeman. *Held*, that, on the issue of fact thus presented, all that occurred or was said between plaintiff and the conductor and brakeman, and the language, manner and conduct of the parties during the conversation, and leading up to the assault, was admissible in evidence as part of the *res gestæ*. *Alabama G. S. R. Co. v. Frazier* (Ala. June 10, 1891), 9 So. Rep. 303.

Servant Seizing Passenger to Prevent His Boarding Moving Train—Intoxication of Plaintiff—Evidence.—In *Harrold v. Winona & St. P. R. Co.* (Minn. July 17, 1891), 49 N. W. Rep. 389, the defendant, in its answer and upon the trial, having justified the action of its employe in seizing the plaintiff, in order to prevent him from boarding a train, exclusively upon the ground that such action was taken for the safety of the plaintiff, in view of the facts that he was intoxicated, and that the train was already in motion, the court properly refused to instruct the jury that defendant had a right to exclude the plaintiff from the train on the ground that he was an unfit passenger because of his intoxication, as not being applicable to the issues tendered by the answer.

MULLAN

v.

WISCONSIN CENTRAL R. CO.

(Minnesota Supreme Court, July 3, 1891.)

Passengers—Injury from Fellow Passengers.—It is the duty of a railway carrier of passengers to exercise the highest diligence reasonably practicable to preserve order on its trains, and protect passengers against violence, abuse, or injury from fellow passengers. This duty is exercised under an implied police power to prevent an abuse of their privileges by passengers. Evidence reviewed, and *held* not to show a breach of such duty by the defendant in this case.

APPEAL from Ramsey District Court.

Kueffner & Fauntleroy, for appellant.

Lusk, Bunn & Hadley, for respondent.

VANDERBURG, J.—This action is brought against the defendant to recover damages for an assault committed upon plaintiff by a fellow passenger on board of one of defendant's cars. The plaintiff was a passenger and entitled to protection as such. Railway carriers of passengers are bound to exercise the highest care and diligence in the conduct and management of their business, to prevent accidents or injuries to passengers on their trains. This is the general rule, as applied to the ordinary discharge of their duties as carriers. In respect to the danger of injuries from the misconduct of fellow passengers, and the duty of enforcing proper police regulations, the obligation of the carrier is qualified or limited by the nature of its relation to the passenger. It has no right either to refuse to receive or to expel a passenger, except for good cause. It must exercise the greatest diligence consistent with its obligations to the public and all the passengers, and neglect no reasonable precaution to protect passengers from insult or injury from its servants or fellow passengers; but as respects passengers there is no such privity between them and the carrier as to make the latter directly liable for their wrongful acts, (*Carpenter v. Boston & A. R. Co.*, 24 Hun (N. Y.), 107), and it can only interfere under an implied police power to prevent an abuse of their privileges as passengers. It is held in general terms that the carrier is bound to exercise the utmost diligence in maintaining order and guarding the passengers against violence, from whatever source arising, which

Carriers' duty
to protect
passengers.

might reasonably be anticipated or naturally be expected to occur in view of all the circumstances, and the number and character of the persons on board. *Flint v. Norwich & N.Y. Transportation Co.*, 34 Conn. 554. If this duty is neglected without good cause and a passenger receives injury which might have been reasonably anticipated or naturally expected, from one who is improperly received or permitted to continue as a passenger the carrier is responsible. *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 113; *Weeks v. New York, N. H. & H. R.*, 72 N. Y. 59. That is to say, the strict rule of duty is

Facts in case
at bar.

to be applied in view of the relation which the carrier sustains to all the passengers, and the circumstances of each particular case calling for its exercise. In the case at bar, at the time of the assault upon plaintiff, his assailant was the only other passenger in the car. After the plaintiff and the conductor had adjusted a matter of difference as to his fare, and the conductor was passing down the car, the other passenger, plaintiff's assailant, made an insulting remark to plaintiff accompanied by an oath, which resulted in an altercation, which wound up by plaintiff calling the other a "liar," whereupon the latter "jumped right up upon the impulse of the moment," and "grabbed" plaintiff by the neck, and commenced striking him upon the head. As soon as plaintiff could get his arm loose, he struck his assailant "in the jaw," and the conductor interfered to part them, saying, "This has got to stop." It is evident that the struggle was very animated, and occupied but few seconds, and that the assault was sudden and unexpected, for the plaintiff says on his cross-examination: "I did not anticipate any trouble about the matter. He jumped up and grabbed me by the neck, and commenced knocking me in the face and head." Immediately after the plaintiff called him a liar, he says, "he jumped up in his seat and jumped over at me and struck me." After the conductor interfered and separated the parties, plaintiff says there was no appearance of further trouble. The conductor took plaintiff down the aisle and waited till the other party washed his face. His cheek had been cut by the blow which plaintiff gave him. After the plaintiff had washed the blood from his own face, his assailant, while passing along the aisle near where the plaintiff and the conductor were, suddenly turned and struck the plaintiff again in the mouth. The conductor interfered promptly again, grabbed hold of him "and that ended it." The conductor took him into the baggage car, and plaintiff saw him no more. The second assault was evidently unlooked for and without warning.

We think the court properly dismissed the action upon the

plaintiff's own evidence, for, apart from the fact that the plaintiff must share the blame for the disturbance we are unable to see wherein the conductor failed in his duty or neglected any reasonable precaution on the premises. It is true the plaintiff states in respect to the first assault that the conductor might have interfered sooner, but this appears to be a conclusion not borne out by the facts, which are particularly detailed by the witness in his testimony. The parties were very much excited, and the several blows must have passed between them in a very few seconds. It is not shown that the parties were not separated as promptly as the circumstances would admit, and it is sufficiently clear that the assault was in each case sudden and unexpected. The plaintiff failed to make case for the jury, and the order denying a new trial is affirmed.

Company
not liable.

Liability of Carrier for Assaults Upon Passenger by Fellow Passengers and Strangers.—See *Winnegar v. Central Passenger R. Co.* (Ky.), 34 Am. & Eng. R. Cas. 462; *Sachrowitz v. Atchison, T. & S. F. R. Co.* (Kan.), 34 *Id.* 382, note 386; *Spohn v. Missouri Pac. R. Co.*, 26 *Id.* 252, note 256; *Chicago & A. R. Co. v. Pillsbury*, 31 *Id.* 24; *Felton v. Chicago, etc., R. Co.*, 27 *Id.* 229, note 26 *Id.* 256.

In the case of *Spohn v. Missouri Pac. R. Co.*, 101 Mo. 418, it was held that a carrier of passengers by railroad is bound to use the utmost practicable care, not only to safely transport its passengers, but to protect them in transit from violence and insults from those on the train, including fellow passengers. A failure to do so will render the carrier liable for any damage naturally and directly resulting therefrom. But a railroad company as a carrier of passengers is not necessarily responsible for any act a passenger may do, such as jumping from the train, in consequence of some breach of duty on the part of its employes. It is liable only for such results as are natural and probable consequences of such breach of duty. The agents of the company are not chargeable with knowledge of a passenger's "intelligence and experience in life." They are authorized to act upon the appearance before them, where they have no other notice of the facts.

BIBB'S ADM'R

v.

NORFOLK & WESTERN R. CO.

(*Virginia Supreme Court of Appeals, Feb. 12, 1891.*)

Independent Contractor.—Construction of Railroad Bridge.—The fact that a railroad company in letting to contract the replacement of a bridge forming part of its line, retains the right to use the bridge for the passage of trains during the progress of the work, and reserves also to its chief engineer the right to criticise the method of erection and workmanship, although not reserving the right to *direct* the methods in which the contractor should replace the bridge, does not destroy or even impair the relation of independent contractor as between the railroad company and the contractor.

Same—Injury to Contractor's Workman—Liability of Company.—In such a case the act of a contractor's foreman, in signaling a train to cross the bridge while in an unsafe condition, was the negligent act of the independent contractor, and the railroad company is not liable to employees of the contractor for injuries caused by such negligent act.

Same—Master and Servant.—In this case, the relation of master and servant did not exist as between the railroad company and an employe of the contractor, but only existed as between the contractor and his employes, and for an injury to an employe of the contractor incident to the replacing of the bridge and caused solely by the negligent act of the contractor or his agent, the contractor alone is responsible.

Replacing Railroad Bridge—Validity of Contract.—It is competent for a railroad company to let out to a contractor the work of replacing a bridge on the company's line of railroad.

Penn & Cocke, for appellant.

T. J. Kirkpatrick and *Griffin & Watts*, for appellee.

RICHARDSON, J.—This was an action on the case brought in the corporation court of the city of Roanoke, in November, 1887, by J. A. Page, Admr. of S. S. Bibb, deceased, against the Norfolk and Western Railroad Company, to recover damages for the alleged killing of the plaintiff's intestate by the carelessness of the defendant company in running one of its trains in and upon a certain bridge over Big Otter River in the county of Bedford and in the line of said railway, and then in course of construction by one Fred H. Smith, who had contracted with said company to erect same, the plaintiff's intestate being at the time in the employ of said contractor and engaged at work in and upon said bridge.

The declaration contains three counts; the first of which as originally drawn was, on demurrer, held to be defective; and thereupon the plaintiff substituted another first count. This count sets forth in substance, that "The said defendant undertook to rebuild, replace and repair a certain bridge, the same being a part and parcel of line of road aforesaid, across Big Otter River, in the county of Bedford, in said state, and thereupon made a contract with one Fred H. Smith for the erection of said bridge, by the terms of which contract, it was agreed, amongst other things on the part of the said defendant, that said defendant would furnish suitable and proper materials for the erection of said bridge, and that it would use due and proper care in the running of its trains and engines in and upon said bridge; and the said Smith, on his part, agreed, amongst other things, to erect and place said bridge across said stream." This count then proceeds to set forth that the plaintiff's intestate was employed by Smith to work on the bridge, and charges that the defendant company did not furnish suitable and proper materials for said bridge

and did not use due and proper care in running its engines and trains upon said bridge, "but on the contrary furnished improper and defective materials and on the—— day of March, 1887, while said Bibb was so employed about said work, caused its trains to be run upon said bridge, so that the same was broken down and fell" in and upon said Bibb, &c. This count, thus substituted for the original first count, was also demurred to, but the demurrer was overruled. The second count in the declaration differs from the first only in this: that it confines the negligence and wrong charged to the careless manner in which the defendant company caused its engine and train to be propelled in and upon the bridge. The third count charges that the wrong and negligence of the defendant company consisted in the act of running the train upon the said bridge when it was in an incomplete and dangerous condition, and when it was not properly and sufficiently supported with timbers, braces and trestles. To this declaration the defendant pleaded "not guilty," and upon the issue joined upon that plea the case was tried. Pending the trial, the plaintiff took several bills of exception to rulings of the court touching certain instructions asked for by him.

The jury returned a verdict for the defendant, and thereupon the plaintiff moved the court to set aside the verdict, as being contrary to the law and the evidence, and to grant him a new trial; but the court overruled the motion and entered judgment according to the verdict of the jury; and to this action of the court the plaintiff also excepted; and in this bill of exceptions the court certifies not the evidence, but the facts proved; and the case is here upon a writ of error to said judgment, allowed by one of the judges of this court.

This case, which was pending at the place of session of this court at Wytheville, was removed therefrom to its place of session at Richmond, and was, upon full argument, heard by this court at the—— term thereof 18—, when the judgment of the court below was affirmed by an evenly divided court of four judges. Upon the application of the plaintiff in error, a re-hearing was granted, and the case was again heard by this court at its—— term, 18—, at Richmond, all the judges being present.

The plaintiff's case, as urged before the court below, is fairly presented in his three bills of exception taken pending the trial to certain rulings of that court. The real case, at large, is presented in the plaintiff's bill of exceptions taken to the action of the court overruling his motion to set aside the verdict of the jury and grant a new trial, and in which the court certifies the facts proved. This exception is, in the record, entitled

Bill of excep-
tions — Irreg-
ularity.

"Plaintiff's Bill of Exception, No. 1," when in the natural and logical order of things, it should have been designated as his fourth and last. But this irregularity is not material, as the exception contains the court's certificate of the facts proved, and upon which, in the view taken of the case, the decision must mainly, if not entirely turn.

The substantial and material facts, certified by the court as proved are these: The Norfolk and Western Railroad

Facts.

Company, during the fall and winter of 1886-7, contracted with Fred H. Smith for the erection of an iron bridge over Big Otter River, in Bedford County, Virginia, and in the line of said company's railway. Smith was a professional and practical bridge builder, had large experience in erecting such structures, and as sole contractor and also as co-contractor with the Edgemore Iron Company, of Wilmington, Delaware, had erected several important bridges for this railroad company, and among them, the High bridge across the Appomattox River, which was built by said Edgemore Iron Company and said Smith as co-contractors with said railroad company. And subsequently Smith, as sole contractor with said railroad company, erected the Six-Mile bridge across James River below Lynchburg, the Ivy Creek bridge, and the Big Otter bridge, the one here in question. That the iron taken from the old High bridge was used in the erection of other bridges in the line of said railroad, and, among them, Big Otter bridge; and to adapt the old High bridge iron to that purpose, it was cut and welded at the Roanoke Machine Works of the Norfolk and Western Railroad Company, and the iron so prepared, with all other materials for Big Otter bridge, was furnished by said railroad company, and with the material so furnished Smith was to build the bridge across Big Otter River, in place of the old bridge at that point, the work to be conducted and accomplished in such manner as not to interfere with the running of the company's trains during the erection of the new and the removal of the old bridge. That the contract between the Norfolk and Western Railroad Company and F. H. Smith was partly in writing and partly parol, consisting in the main of correspondence by letters and by telegram. In making the contract, the railroad company was represented by its chief engineer, W. W. Coe; and that, in a conversation between Smith and said chief engineer, it was agreed that the stipulations in the contract for the erection of the High bridge should, so far as applicable, continue in force as to the contract for the erection of Big Otter bridge. That under the plans for the erection of Big Otter bridge, trestling was required all the way between the piers, or a

carry span was to be used to support the weight on the bridge while in course of construction ; that in the erection of said bridge, it was the understanding of chief engineer Coe that he had the right to criticise, both the method of erection and workmanship, but did not have the right to direct the methods in which the contractor should erect the bridge, and that he could have stopped the trains if he had known the condition of the bridge to be unsafe ; that Maj. J. B. Goodwin was at the time in the engineering department of the railroad company and charged with the duty of inspecting and furnishing the materials for the bridge, and of reporting progress in the erection of the bridge to chief engineer Coe, and that he usually went to the bridge every day, and had the same right to criticise that engineer Coe had ; that he was there on the day of the accident, had been on the ground two hours, and left the bridge three minutes before the accident, and when the train was signaled to go forward, he was in the act of getting upon the caboose, with the intention of riding across, when he heard the crash and went to the wreck. In the certificate of facts proved, there is set out at large the long correspondence, by letter and telegram, between Smith and chief engineer Coe leading up to the contract in question ; so much of which as is material will be hereinafter referred to. The most important part of this correspondence, and that which bears directly upon the contract for the erection of Big Otter bridge is found in Smith's proposition, contained in his letter, dated, Baltimore, December 13, 1887, addressed to chief engineer Coe, at Roanoke, Va., in which among other things, he wrote: "For the proposed rebuilding of Otter Creek (four spans) and Ivy Creek, (three spans) by adopting and erecting eight spans of old High bridge iron at Otter and six spans at Ivy ; I will furnish drawings and advice for, and receive from you and unload at the bridge sites the permanent and temporary lumber and remodelled irons, and will erect the same for three thousand six hundred (3,600) dollars for Otter Creek, and two thousand seven hundred (2,700) dollars for Ivy Creek, payable in January, 1887, or later, if delays occur in the work." This proposition was afterwards accepted by the railroad company, and thus the parties came to an agreement. The court further certifies that the railroad company never furnished materials for erecting trestles under the spans from pier to pier ; that it furnished the necessary materials for a trestle next to each pier ; that this would have left a space of sixty feet without trestling ; that Smith never made requisition for more material for trestling ; that the material furnished by the company was sufficiently strong to bear the

strains to be put upon it; that the defendant used due care in the selection of the materials, and that the accident was not caused by any defect in said materials; that all the force engaged in erecting the new bridge and removing the old one was employed and paid by Smith, the contractor; and that one T. P. Englesby was foreman under Smith and in charge of the erection of the bridge; that it was agreed between the parties that the railroad company's trains should not pass over the bridge during the erection until the signal to pass should be given by said Englesby. That at the time of the accident the bridge, which consisted of four spans, was in course of construction, and the two eastern spans had been completed, and the third was so far completed that the old structure was being removed, the fourth and western span remaining intact; that the railroad company instructed all conductors of trains to stop at the bridge and to await the signal of Englesby before crossing, and to go forward when he notified them to do so. That on the _____ day of March, 1887, the day of the accident, several lighter trains had passed safely over the bridge, a passenger train going west, having passed only a short time before; that late in the afternoon of the day of the accident a heavy coal train arrived from the west and halted near the bridge about fifteen minutes, waiting for a signal to cross; that Bibb, who was an employe of Smith, the contractor, was, at the time, at work fitting and fastening the irons underneath the bridge; that about 5 o'clock P. M., Englesby, Smith's foreman, caused the signal to be given for the train to go ahead; that the signal was given by a colored man (whose name was not proven) employed by the railroad company to signal the trains under Englesby's instructions; that the train moved east at the rate of about three miles per hour. That the bridge consisted of four spans, the two eastern spans of the old bridge having been cut away some time, and the new spans being in place; that the third span, from the east, was in an incomplete state, the old work having been that day cut away, the old work in the fourth span still being in place; that the train in question consisted of a consolidated engine, with its tender and _____ coal cars, with a caboose in the rear; that the engine, tender and one or two cars passed safely over the incomplete span and had gotten upon the third span from the west, when the two front wheels of truck were seen to jump the rails immediately over the pier, where the old work and the new were joined," where, and in a very short time, the span gave way and hurled the train in the chasm beneath, resulting in the death of six of Smith's employes, and among them, S. S. Bibb, the plaintiff's intestate; that at

the time of the accident, the span which fell was incomplete, the lateral braces, sway braces and struts not having been put in position; that the lateral braces and rods of iron which connect the chords of the bridge on either side by a net work crossing each other; that the sway braces are rods of iron which cross each other from top to bottom, connecting the top of one truss to the foot of the other; that the struts are rods of iron which, running at right angles across the bridge, connect the outer trusses between each set of lateral braces, which connect the same parts of the bridge by diagonal lines; that this bridge consisted of four trusses, the outer ones on either side being intended to be connected, as above described, by lateral braces, sway braces and struts; that near the center of the bridge were two other trusses which were intended to double the strength of the bridge; that at the time of the accident the floor beams, upon which were placed the rails, rested upon the outer trusses on either side but did not rest upon the inner ones; that it was intended that blocks should be placed on each of the inner trusses, connecting them with the floor timbers, that they might bear their part of the strain on the bridge; but that these blocks were not in position, and hence the inner trusses bore no part of the weight upon the bridge; that it was proven that the lateral braces, sway braces and struts are important to strengthen the bridge; the former being intended to resist pressure from wind storms and to hold the bridge rigid against the lateral vibrating motion which attends the moving of a train upon it, the struts as part of the lateral brace system, and the sway braces to hold the trusses in perpendicular lines, and by connecting the two, prevent either from swaying out of line; that it was also proved that a span of bridge of the dimensions of the one in question would be very unsafe to run a train of cars upon, if these lateral braces sway braces and struts were not in position; that to run a train of coal cars upon such a bridge in such a condition would be foolhardy; that the bridge would be so unsteady that it would be liable to fall with the weight of such a train standing upon it; that with a moving train upon such a bridge any vibratory motion once started would continue to increase until the bridge would inevitably fall, there being nothing to resist such motion, except the floor timbers which would not be sufficient for that purpose; and that the span in question fell under the weight of the train, because the lateral braces, sway braces and struts had not been placed in position.

It is also certified as a fact proved that Smith was an engineer in good standing, was a practical bridge builder, and

had been for a considerable time engineer for the Edgemore Iron Company, of New Jersey, which was largely engaged in the manufacture of iron bridges. The former contract for the erection of the High bridge, which, so far as applicable, was to continue in force as to the erection of the Big Otter bridge here in question, is set out in full in the certificate of facts proved. It is very long and only what follows has any bearing upon this case: In that case the contractors furnished the materials for the work, which was to be done for a stipulated price, and they were to erect the bridge in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the chief engineer of the railroad company, the work to be done and finished agreeably to the instructions of said company's engineer or his assistants, and in accordance with the plans furnished by the contractors and approved by said engineer, which plans were made part of that contract. That contract also contains the following specifications: "The bridge to be proportioned for single track, with the trusses twelve feet, two and one-half inches, centre to centre, and for sustaining with the dead weight of the structure the passage of the following rolling load: Two consolidation engines, *en train*, weighing each, 176,000 lbs. on a wheel base of 46 minutes, 5 seconds, for each engine and tender, 96,000 lbs. of the weight being concentrated on a wheel base of 14 minutes and followed by a train weighing 3000 lbs. per lineal foot, with dead weight of structure and above live load and a wind strain of 500 lbs. per lineal foot of structure, strains in numbers not to exceed: Tension iron lateral bracing 12,000 per sq. in.: iron chords and diagonals 10,000 lbs. per sq. in.: steel chords and diagonals 12,000, lbs. per sq. in.: The whole of the construction to be first class and in strict accordance with the drawings and the specifications. Free access is to be given for the inspection of materials and workmanship, and all required test pieces are to be properly shaped and tested without charge." Said High bridge contract also contains certain conditions, eight in number, the fifth and seventh of which, only, have any application to this case, and they are as follows: V. "It is further covenanted and agreed between the said parties that the said parties of the first part shall not sub-let or transfer this contract or any part thereof to any person (except for the delivery of material) without the written consent of the engineer, but will, at all times, give personal attention and superintendence to the work." VII. "The said parties of the first part have further covenanted and agreed to take, use, provide and make all proper necessary and sufficient precaution, safeguards and protection against the occurrence or happening

of any accidents, injuries, damages, or hurt to any person or property during the progress of the construction of the work herein contracted for, and to be responsible for and to indemnify and save harmless the said party of the second part, and the said engineer for the payment of sums of money by reason of all or any such accidents, injuries, damages, or hurt that may happen or occur upon or about said work, except said injuries arise from obeying the engineer's written orders, against the written protest of the party of the first part, and from all fines and penalties and loss incurred for and by reason of the violation of any city or borough ordinance or regulation, or law of the state, while the said work is in progress of construction."

Such are the material facts certified by the trial court, and in light of these facts, applying thereto the appropriate legal principles, we must determine whether there is error in the judgment of the court below. But before proceeding to consider the case on its merits, it is proper to dispose of two questions raised on demurrer in the court below, the rulings as to which are relied on as error in this court.

In the court below, the defendant company demurred to the first count in the plaintiff's declaration, which demurrer was sustained by the court; and it is insisted here that the court erred in that ruling. Without going into a careful analysis of the count demurred to, it is sufficient to say that it was plainly too vague and indefinite in its allegations to correctly inform the defendant company of the real case it was called on to meet. We are, therefore, of the opinion that the demurrer was properly sustained.

Demurrer to first count.

Subsequently, the declaration was amended by substituting a new count for the original first count in the declaration; and to this substituted count the defendant also demurred; but the court overruled the demurrer, which action of the court the defendant in error relies upon as error here. While it may be true that the count is somewhat awkwardly drawn, we are nevertheless of opinion that it is sufficient. It certainly, with sufficient details, states and sets forth when, where, in what manner, and under what circumstances the plaintiff's intestate met his death, and charges that the death resulted from the negligent and wrongful acts of the defendant company. This is sufficient; and we are of opinion that the court did not err in overruling the demurrer to said first count as amended.

Amended count not demurable.

The question presented by the record before us is one of first impression in this state, and is one of great practical importance. It is whether a railroad company or any person, natural or artificial, who undertakes the erection or repair of

a building, or other work for his own benefit, is responsible for injuries to third persons, occasioned by the negligence of a servant of the builder or the person who is actually engaged in erecting the building or other work, under an independent employment, or a general contract for that purpose. Such is the general scope and bearing of the question presented. But in the light of the peculiar circumstances of the case in hand, the question is one of yet more special significance, and may be stated thus: Can the railroad company in this case be held liable in damages for the death of the plaintiff's intestate, the latter at the time of the accident which resulted in his death, being the employe and servant, not of the railroad company, but of one Fred H. Smith, who was at the time in the exercise of an independent employment and engaged in erecting the bridge over Big Otter, under a contract with said company, the work to be done for a stipulated price for the job complete, the railroad company reserving no right of control as to the means and methods of doing the work contracted for?

The question thus stated presents in outline the case made by the pleadings and facts certified as proved, and upon which our decision must be based.

In order to the proper solution of the question above propounded, it is necessary in the first place to inquire into what constitutes an independent contractor. In Mechem's valuable work on Agency, he makes the following clear statement of the law: "The principal's liability for the acts of his agent, within the scope of his authority depends upon the fact that the relation of principal and agent exists. It is the principal's will that is to be exercised; his purpose that is to be accomplished; his are the benefits and advantages which ensue. He selects his own agent, puts him in motion, and has the right to direct and control his actions. It is, therefore, just and proper that he should be responsible for what the agent does while so employed. When, however, the principal has not this right of control, a different rule prevails. Neither reason nor justice requires that he should be held responsible for the manner of doing an act when he had no power or right to direct or control the manner." Mechem on Agency, § 747. And in this connection the author quotes with approbation the remark of Baron ROLFE, in *Hobbit v. London and North-western Railway Co.*, 4th Exch. 255, "that the liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, '*Qui facit per alium facit per se.*'" The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful

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or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed ; but neither the principle of the rule, nor the rule itself, can apply to the case when the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned." The same author further says: "If, therefore, the principal, using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work. The employment is regarded as independent where the person renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." And the author further says: "The independent contractor is usually paid, in common parlance, by the job, but the fact that he is paid by the day does not necessarily destroy the independent character of his employment." * * * "This rule of immunity from liability," says the author, "is, however, subject to certain exceptions. No one can lawfully delegate to another the authority to do an unlawful act, nor can one upon whom the law imposes the performance of a duty, relieve himself from responsibility for its non performance, by committing the performance to a substitute. Thus, if the thing to be done is in itself unlawful, or if it is *per se* a nuisance, or if it cannot be done without doing damage, he who causes it to be done by another, be the latter servant, agent or independent contractor, is as much liable for injuries which may happen to third persons from the act done, as though he had done the act in person." * * "So it is the duty," says the same author, "of every person who does in person or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken, and he cannot escape this duty by turning the whole performance over to a contractor. Of the same nature is the duty which the law imposes upon every person who, for his own purposes, brings on his lands, and collects or keeps there, anything likely to do mischief if it escapes, to keep it in at his peril; and if he does not do so, he is *prima facie* answerable

for all the damage which is the natural consequence of its escape."

In stating the first branch of this proposition, the author was not as guarded in the language employed as he might and, perhaps, should have been, in the light of the decided cases upon which he seems to have based his statement of the principle. The language, at first blush, seems to be open to the interpretation that every person, natural or artificial, who does in person, or causes to be done by another, work which from its nature is *liable*, unless precautions are taken, to do injury to others, must see to it in person that the necessary precautions are taken, and cannot escape liability for the non-performance of such duty by turning the whole performance over to a contractor, although the employer has exercised proper care in the selection of a skillful and competent person, exercising an independent employment, and has contracted with such person for the execution of the entire work by the means and methods of his own selection. Work is constantly being performed by independent contractors, as well as others, which in the nature of things *may*, in the course of its execution, result in injury to others; but it by no means follows, that an employer in every such case must personally supervise the work and see that the necessary precautions are taken, and that, for his failure to do so, he must be held liable in damages for injuries to other persons. For if, in the nature of things, the mere *liability* of the work to result in injury to some one be made the test, then it is obvious that the line of distinction becomes shadowy and indistinct between acts which are unlawful, or are *per se* nuisances, or that cannot be done without doing damage, and those the performance of which not only may but in the nature of things must often be committed to others; as in the case with a railway company in the construction and repair of its road-way, bridges and other structures.

This view seems to be in unison with the real meaning of the author himself, if we are to judge by the decided cases to which he refers; for immediately in connection with his statement of the distinction now under consideration, he makes this remark: "This distinction has been stated in a recent case as follows: (referring to and quoting the language of POWERS, J., in *Bailey v. Troy & B. R. Co.*, 57 Vt. 252) where it is said: "If the work to be done is committed to a contractor to be done in his own way, and is one from which, if properly done, no injurious consequences to third persons can arise, then the contractor is liable for the negligent performance of the work. If, however, the work is one that *will*

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result in injury to others unless preventive measures be adopted, the employer cannot relieve himself from liability by employing a contractor to do what it was his duty to do to prevent such injurious consequences. In the latter case, the duty to so conduct one's own business as not to injure another continuously remains with the employer."

There is a manifestly broad distinction between the statement of the author (Mechem) and that of the judge whose language is quoted as illustrating the distinction stated by the former. In the former, the author makes the fact that the act to be performed is, in its nature *liable* to result in injury to others the test; while the judge whose language is quoted, applies as the test the fact that the work is one that *will* result in injury to others unless preventive measures be adopted.

But we find the principle nowhere more justly, clearly, and satisfactorily stated than in 2d Wood's Railway Laws, § 284, pp. 1012-13, where the author, quoting the language of APPLETON, J., in *Eaton v. European & N. R. Co.*, 59 Me. 520, 8 Am. Rep. 430, says: "When the contract is to do an act in itself lawful, it is presumed it is to be done in a lawful manner. Unless, therefore, the relation of master and servant exists, the party contracting is not responsible for the negligent or tortious acts of the person with whom the contract is made, especially if those acts are outside the contract. If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible."

Further authorities as to independent contractor reviewed.

The same author then proceeds to say: "If the company can be said to have co-operated in the act which produces the injury, it is liable; and this is always the case when the act must necessarily be productive of a nuisance;" citing *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77; *Robinson v. Webb*, 11 Bush. (Ky.), 464; *Ellis v. Sheffield Gas Co.*, 2 El. & Bl., 764; *Pealy v. Rowland*, 13 C. B. 867; *Hobbit v. London & N. W. R. Co.*, 4 Exch. 454; *King v. New York Cent. R. Co.*, 66 N. Y. 181; *Congreve v. Morgan*, 5 Duer (N. Y.), 495; and the author adds the remark: "In all cases it will be presumed that the act was to be done in a lawful manner, and with proper care and skill."

The principle just stated is well illustrated by the case of *Reedie v. The London and Northwestern Railway Company*, reported with *Hobbit v. London, etc., R. Co.*, *supra*. In that case the railway company had let out, by contract, the building of a viaduct, which was a part of their railway, to contractors. Through the negligence of the men employed

by the contractors a heavy stone was dropped from the work, and falling upon the plaintiff's husband, who was lawfully passing along the highway, killed him, and in an action by the wife for this injury it was held that the company was not liable. And in delivering the opinion of the court, Baron ROLFE used this language: "The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, *qui facit per alium facit per se*. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of any unskillful or careless person to execute his orders should be responsible for any injury resulting from the want of skill, or want of care, in the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligence the injury has been occasioned." And the learned Baron in support of the view thus presented, referred to the concurring cases of *Quarman v. Burnett*, 6 M. & W. 497; *Rapson v. Cubitt*, 9 M. & W. 709; and *Milligan v. Wedge*, 12 Ad. & El. 737, as settling the principle. And then in recognition of the same principle laid down by LITTLEDALE, Justice, in *Langher v. Pointer*, 5th B. & C., 560, the same learned Baron remarked in substance, that to decide that the railway company was liable would be equivalent to deciding that the contractors, whose servant did the injury were not liable, a proposition that could not be maintained.

Langher v. Pointer, *supra*, was an action to recover damages for an injury done to a horse of the plaintiff, by the negligence of another person under those circumstances: The defendant owned a carriage and hired of a stable keeper a pair of horses and a driver, to draw it for a day, or a short time. The injury for which the suit was brought was the result of the carelessness of the driver, while the defendant was riding in the carriage. The plaintiff brought his action against the owner of the carriage. The judge before whom the cause was tried non-suited the plaintiff; and a strong attempt was made for a new trial, both in the King's bench and Exchequer Chamber, which failed on account of a disagreement among the judges in both courts, as to the question whose servant the driver was that did the injury, whether in the act of driving he was the servant of the defendant, who was riding in the carriage, or of the stable keeper who sent him with the horses to draw it. In this case, LITTLEDALE, J., put his opinion that the owner of the carriage was not liable for the injury done to a third person by the negligence of the driver, on the ground that the driver could not be the servant of both the

stable keeper and the owner of the carriage, and the learned judge remarked that the driver "was the servant of one *or* the other but not the servant of one *and* the other; that the law did not recognize a several liability in two principals."

Quarman v. Burnett and others, 6 M. & W. 497, is the case of *Langher v. Pointer* over again. In that case the defendants, who were the owners of a carriage, hired a pair of horses from another person, and a driver to drive them to a carriage for a short time, during which an injury was done to the plaintiff's horse and chaise by the carelessness of the driver, for which the owner of the horse and chaise, brought his action against the owners of the carriage. The defendants pleaded, first, not guilty: second, that the carriage and horses or either of them were not under the care of the defendants. Upon the trial the jury found a verdict for the plaintiff, and the judge reserved the liberty to move to enter a non-suit. On the decision of this motion, Baron PARK delivered the opinion of the court, which was that the defendants were not liable, and that a rule be made absolute enter a verdict for them. In the course of his very able opinion, the learned baron says, that "upon the principle that, *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stands in the relation of master to the wrongdoer; he who had selected him as his servant from the knowledge of, or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey. But the liability by virtue of the relation of master and servant, must cease, when the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another."

The decision in *Quarman v. Burnett* was approved of and followed in *Rapson v. Cubitt*, 9 M. & W. 709, and in the case of *Reedie v. London & N. W. R. Co.*, *supra*, and in a great many later English cases; and the doctrine of these cases was adopted by Judge STORY in his commentaries on the laws of agency, (2d. Ed. § 453, B.) And the same principles, especially as laid down by Lord LINTERDEN and LITLEDALE, J., in *Langher v. Pointer* and by Baron PARK in *Quarman v. Burnett*, were recognized and followed by this court in *Muse v. Stem*, 82 Va. 33, without any qualification. See opinion of HINTON, J., in that case.

Milligan v. Wedge, 12th Ad. & El. 737, is another case that powerfully illustrates the propriety of the rule that exempts any employer from liability for injuries resulting from the carelessness of an independent contractor, or his agents or

servants, where the employer has exercised due care in the selection of a competent and skillful contractor, who employs and pays his own workmen, who are subject to his orders only, and who does the work by means and methods of his own selection. In that case, the rule of *respondet superior* was fully and ably considered, upon the facts. The defendant who was a butcher, had bought a bullock at Smithfield market, in the city of London, where persons who drive cattle for others are required to be licensed. The butcher employed a licensed drover to drive the bullock to the slaughter house, which was within the bounds of the city. The drover employed a boy to drive the ox, who conducted the matter so negligently that he permitted the ox as he was passing by the plaintiff's show room, in which he had marble chimney pieces, etc., for sale, to run into the show room and break the chimney pieces, for which injury the plaintiff sued the butcher. The judge before whom the case was tried, was of opinion that the boy was not the servant of the defendant. In this case, WILLIAMS, J., said: "The difficulty always is, to say whose servant the person is that does the injury; when you decide that, the question is solved."

In the leading New York case of *Blake v. Ferris*, 1st Selden, 48, it was held that where persons having a license or grant to construct, at their own expense, a sewer in a public street, engage another person to construct it, at a stipulated price for the whole work, they are not liable to third persons for any injury resulting from the negligent manner in which the sewer may be left at night, by the workmen employed in its construction; that the immediate employer of the agent or servant through whose negligence an injury occurs, is the person responsible for the negligence of such agent or servant, and that to him the principle *respondet superior* applies. In that case, the opinion—a very able one—was delivered by Judge MULLEN; in the course of which he says: "The rule of *respondet superior*, as its terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation wherever it exists, whether between principal and agent, or master and servant, and to the subjects to which that relation extends, and is co-extensive with it, and ceases when the relation itself ceases to exist. It is founded on the power which the superior has a right to exercise over the acts of his subordinates. Therefore, the rule cannot be applicable to cases where no such power exists. The absolute and direct coincidence and co-existence of the rule *respondet superior* with the relation to which it is applicable, and to the subject matter to which that relation extends is an important proposition in determining the applicability of the rule, citing

as illustrations, all the cases above referred to, and adding the remark that all of these cases are cited with approbation by Mr. Justice STORY, in his commentary on agency, Sec. 453, A. B. & Co. The American authorities, holding substantially the same doctrine, are too numerous for convenient citation—some of which will hereinafter be referred to. In fact, we may safely venture the remark that upon a careful examination of all the authorities—applying to them the tests of right, reason and common justice, and looking at them in the light of sound, well settled principles—no well considered case will be found holding a different doctrine.

It is not claimed that there is that uniformity in the decided cases which is always so much to be desired. On the contrary, there are a number of cases in irreconcilable conflict with each other, and with the cases above referred to; but the overwhelming weight of authority is in accord with the cases above referred to. It is safe to say that, while other causes have contributed to this conflict in the decided cases, it originated in the erroneous and monstrous doctrine held in the old English case of *Bush v. Steinman*, B. & P. 404, in which A. having a house by the roadside, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; C. with D. to furnish the materials; the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned, and he was injured. The court held that A., the owner of the house, was answerable for the damage sustained. Thus, the owner of the property, notwithstanding he had let the work to a contractor, was held liable for absurdly remote and inconsequential damage. But for the authoritative report of the case, it could scarcely be believed that any court of high authority ever made a decision so utterly opposed to reason and justice. But that case was decided near one hundred years ago, when many crude doctrines were advanced that are now disregarded, as unsound, misleading and unjust. The doctrine of that case, from its inception, met with stern resistance from bench and bar. In subsequent English cases it was sometimes urged as the settled law of the country, but was doubted and avoided by the English judges; in others it was not referred to by either counsel or court; and, finally, after a somewhat equivocal controversy, lasting some fifty years, it was entirely overturned and repudiated in the case of *Reedie, etc. v. London & Northwestern Railway*, *supra*; in which Baron ROLFE said that: "according to the modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded."

The conflict
of authority.

The contest was renewed in this country, and in *Hilliard v. Richardson*, 3 Gray (Mass.), 349, in an exceedingly able opinion, by Judge THOMAS, expressing the unanimous opinion of the supreme court of Massachusetts, all the authorities, American and English, were elaborately and ably reviewed, and the doctrine of *Bush v. Steinman* was repudiated out and out, it being demonstrated that that case promulgated a doctrine which had no existence in England prior to that decision, and that it was not law in either England or America; and the supreme court of Massachusetts held that the owner of land, who employs a carpenter, for a specific price, to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a teamster in the employ of the carpenter, and intended to be used in such alteration and repair. This case of *Hilliard v. Richardson* is entitled to peculiar weight and influence, not only by reason of the carefully considered and able opinion delivered by Judge THOMAS, but because it was decided by a bench of judges presided over by that eminent jurist, Chief Justice SHAW.

The character of the decisions in conflict with those above referred to, and the untenable grounds upon which they rest, may be well illustrated by a brief comparison; first, of two English cases, *Hale v. Sittingbourne & S. R. Co.*, 6 H. & N. 488, and *Butler v. Hunter*, 7 H. & N. 826; and, second, of two American cases—*Scammon et al. v. City of Chicago*, 25 Ill. 424, and *City of Chicago v. Robbins*, 2 Black. (U. S.), 418.

Hale v. Sittingbourne & S. R. Co. supra, was a case in which the defendant company was authorized by Act of Parliament to construct a drawbridge across a navigable stream, the act providing that it should not be lawful to detain any vessel navigating the river for a longer time than was necessary to enable any carriages, animals or passengers, ready to traverse, to cross the bridge, and for opening it to admit such vessel. The defendant company employed a contractor to construct the bridge, and by some defect in the construction of the draw the bridge could not be opened, and the plaintiff's vessel was thereby prevented from navigating the river, and the court held that the defendant company was liable. The opinion was delivered by POLLOCK, C. B., who in the course of his opinion said: "When a person is authorized by Act of Parliament or is bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do that work; quoting the remark of Lord CAMPBELL, in *Ellis v. Sheffield Gas Co.*, *supra*, where it

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was said: "It is a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract. *I am clearly of the opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing, as if he did it himself.* No one will controvert the accuracy and justness of this remark of Lord CAMPBELL; for under the rule above laid down, if a man employ another to do an unlawful act, or an act that is *per se* a nuisance, he, of course, as well as the person who was employed and did the act would be liable, otherwise if the act to be done was in itself lawful, and the injury resulted from the carelessness of the contractor or his agents and servants. But the learned chief baron proceeds to say in substance: "When the act complained of is purely collateral and arises incidentally in the course of the performance of the work, the employer is not liable, because (states the writers) *he never authorized the act; the remedy is against the person who did it.* But when the contract is to do a particular act the doing of which produces mischief, another doctrine applies." What other doctrine is it, we ask, that then applies? None other than what is comprehended in any one of the prominent exceptions to the rule, above laid down, that exempts an employer, under certain circumstances, from liability for injuries resulting from the carelessness of a contractor or his agents or servants; for instance, if the act to be done is in itself unlawful, or if it is *per se* a nuisance, or if its performance must necessarily result in a nuisance, or cannot be done without damage to third persons, then, in either event the employer is liable—as much so as if he did the act himself. But POLLOCK, C. B., proceeds to say: "Here the legislature empowered the company to build the bridge; in building that bridge the contractor created an obstruction to the navigation, and for that the company are liable." * * * "So here, it was the duty of the company to see *how* the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do, what materials he would use, and to have seen that the specifications and materials were such as would insure the construction of a proper and efficient bridge. The learned Chief Baron was, however, careful to add: "But I do not rest my judgment on that ground, but simply on this, *that there is a distinction between mischief that is collateral and that which directly results from the act which the contractor agreed and was authorized to do.*"

This reasoning is palpably unsound, at variance with the remarks of Lord CAMPBELL, quoted by the Chief Baron, and wholly inapplicable to the case under consideration. The

report of the case shows that the railway company let the work to be executed according to the requirements of the Act of Parliament, and that the injury complained of occurred during the erection of the bridge, and before it was completed and turned over to the company. Though the report of the case does not show precisely how it occurred that the draw failed to open on that occasion, it is quite likely that for some unforeseen cause there was a mere temporary obstruction to the navigation: in which case common fairness would dictate a liberal construction of the statute in favor of the company, and even the contractor, the bridge being a work of public importance, superior to the interests of the private ship owners, whose vessel was only temporarily detained. But however this may have been, Chief Baron POLLOCK puts his judgment upon the distinct, but untenable ground that the mischief was the direct result of doing the thing which the contractor agreed to do and was authorized to do, when, as before stated, the company let the work to the contractor to be executed according to the requirements of the Act of Parliament. What possible reason or excuse, then, could there have been for the ruling which, in effect, held that the railway company deliberately employed and authorized the contractor to do an unlawful act—to construct the bridge so as to obstruct the navigation of the river. And strongest of all is, that the Chief Baron quotes with approbation the language of Lord CAMPBELL in *Ellis v. Sheffield Gas Co.*, *supra*, which by no means sustains the conclusion arrived at in *Hale v. Sittingbourne & S. R. Co.*, the judgment in which cannot possibly be upheld on the ground upon which it was put; nor upon any now recognized principle or rule of decision.

One year later, the same learned judge, in the same court, decided the case of *Butler v. Hunter*, *supra*, in which, upon principle, he practically repudiated the doctrine held by him in the former case. In *Butler v. Hunter*, the defendant employed an architect to repair his house, and it became necessary to take down and rebuild the front thereof; and the work was let to a builder. The plaintiff was the owner of the adjoining premises, between which and the defendant's house there was a party wall fourteen inches thick, and in front of the defendant's house what is called a brest-summer, one end of which was inserted into the party wall about six inches. In removing the front of the defendant's house the contractor's workmen removed the brest-summer, and not having shored up the plaintiff's house, the front wall thereof fell, and he was considerably damaged thereby. It appeared that the work might have been done with safety if the wall

had been shored up, which was the ordinary and usual precaution adopted in such cases, and the court held that the defendant could not be held chargeable. "I think," said POLLOCK, C. B., "that as a matter of fact if a person gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesmanlike way, and the employer has a right to presume that he will do it in that way; and if he is guilty of no negligence in the selection of a contractor, he cannot be held chargeable, because he did not personally see to it that the work was done."

In this case the position was taken and ably argued by the plaintiff's counsel that inasmuch as injury might result from a careless execution of the work, the defendant was personally bound to see to it that such precautions were taken as to prevent it; but the court repudiated the doctrine, and held expressly that this duty was only imposed when the injury was consequent upon doing the work in the ordinary mode; and such is the rule established by the decisions both in England and in this country.

Thus stand the two English cases. They cannot be reconciled upon principle. They are decided by the same judge. In the one case he says it was the duty of the railway company to see how the contractor was about to construct the bridge; that it was the duty of the company to ascertain what he was about to do, what materials he would use, and to have seen that the specifications and materials were such as would *insure the construction of a proper and efficient bridge*; though the judgment was put upon an entirely different ground. In the other case, he expressly held and based his judgment upon the ground that the work having been let to a contractor, selected with due care, the employer had a right to presume that the work would be done in the ordinary and tradesmanlike way; that he was not bound personally to inquire and see to it *how* the contractor intended to do or in fact was doing the work.

The language used by POLLOCK, C. B., in *Hale v. Sittingbourne & St. R. Co.*, involves a manifest absurdity. Railroad companies, for reasons of sound public policy, are treated as persons—artificial persons, and except to the extent that they are inhibited by their charters, or the general law, they may contract and be contracted with, sue and be sued, and in general conduct their affairs just as natural persons do. Their corporate affairs must, in the nature of things, be intrusted to human agencies, and their roads and necessary structures can only be built and repaired by the same instrumentalities.

If, according to the doctrine held by POLLOCK, C. B., in *Hale v. Sittingbourne & S. R. Co.*, such a company, after ex-

exercising due care in selecting a competent and skillful contractor, commits the work to him, must see to it in person that the work in all its details is so done as to insure safety, it is at once obvious that a duty is imposed which cannot possibly be performed. The personal superintendence of the board of directors and all the stockholders combined could but confuse matters and lead to multiplied mischiefs, because, if not utterly incompetent, they could never agree among themselves what should be done, nor how.

Must a railroad company have at every point along its line of road, where its important structures are being erected or repaired, not only a competent and skillful, but an infallible engineer to superintend its independent contractors, and direct and control them in all the details of their work? If so, then there is an end to all independent employment, for no sane man would subject himself to the risks which such an arrangement would impose, as he could make no safe calculation upon completing with satisfaction to his employer, or with profit to himself, a work the details of which are subject to the direction and control of another.

In other words, the important and well recognized distinction between the relation of contractor and contractee and that of master and servant would cease to exist, and every contractor, no matter how skillful and competent he may be, would become the mere servant of his employer. Such, in effect, is what was said by POLLOCK, C. B., in *Hale v. Sittingbourne & S. R. Co.*, *supra*, and is practically what is contended for in the present case. No such view can be upheld upon either principle or authority. It can but be obvious to every impartial mind, that when any person, natural or artificial, and especially the latter, has, in the exercise of due care and caution, selected a competent and skillful contractor and has committed the work to be done to him, at a stipulated price, and to be done in an approved, workmanlike way, and the work be lawful and such as can be accomplished without injury to third persons, if done in the usual workmanlike way; then the utmost degree of care and caution has been exercised that can in reason and justice be required of any employer. This view, of course, is confined to cases like the present, and has no application to cases of injury to passengers, or to employes of a railroad company, resulting from the negligence of such company; for, as will presently be more fully shown, in the present case the relation of master and servant did not exist between the railroad company and the plaintiff's intestate, nor was he a passenger on the company's road; so that no claim to recovery can be based upon the principles applicable to either of those relations.

Now let us compare the two American cases—*Scammon v. City of Chicago*, and *City of Chicago v. Robbins*, above referred to. In the first named case, the supreme court of Illinois held, reversing the court below, that an owner of land who contracts with a skillful party to erect a building thereon, and who for that purpose surrenders the premises for the use of the contractor, is not, during the erection of the building, answerable in damages for an accident which occurs to a stranger passing by; and if the sufferer has any recourse, it is against the contractor, or the corporation within which the property is situated; that the parties who may be accused of negligence, under such circumstances, are not the servants of the owner of the premises but the contractor.

American
cases
compared.

In the other case, (*Chicago City v. Robbins*), the supreme court of the United States, reversing the federal district court, overruled in part, the doctrine held by the supreme court of Illinois in the first named case of *Scammon et al. v. The City of Chicago*. The extent to which the doctrine so held was disapproved by the supreme court of the United States appears in the opinion of Mr. Justice DAVIS, when he says, after adverting to the fact that the defendant's counsel had cited and relied on *Hilliard v. Richardson*, 3 Gray (Mass.), 349, and *Scammon et al. v. The City of Chicago*, 25 Ill. 424, that "*Hilliard v. Richardson* was a most elaborate and able discussion of the *respondeat superior*, and the authorities in this country and England were fully reviewed, and we see no reason to question the conclusion at which the court arrived. But that case and the case at bar were not at all alike. That was a case where the owner of a building contracted with a carpenter at an agreed sum to repair it, and a teamster, who was employed by the carpenter to haul boards, left them in the street in front of the lot, and an accident happened. The teamster, when he placed the boards in the street, was engaged in a work collateral to that which the owner contracted for—the repair of the building—and in no sense can the injury be said to happen from the doing of that defectively which the owner directed to be done. The owner was correctly held not liable, and one of the grounds on which the court place their decision was, that it was not a nuisance erected by the owner of the land, or by his license, to the injury of another." Such is the comment of Mr. Justice DAVIS on the case of *Hilliard v. Richardson*, in which he obviously falls far short of recognizing the real scope of the decision or the principles upon which that decision rests. He admits it to be a most elaborate and able discussion of the *respondeat superior*, in which the authorities in this country

and England were fully reviewed, and that he saw no reason to question the conclusion arrived at in that case. But, he says, that case and the one he had in hand, (*Chicago v. Robbins*,) were not at all alike. Viewed in the light of reason and principle, this is somewhat a remarkable distinction—a distinction without a difference. In both cases the owner let the work to independent contractors; in both, the mischief resulted from the carelessness of the servants of the contractors. In other words, in *Hilliard v. Richardson*, the contractor, who had undertaken, at an agreed price, to repair the house of the contractee, employed a teamster to haul boards, and the teamster who was the servant of the contractor, and not of the owner, left the boards in the street in front of the house, by reason whereof the mischief occurred. In *Chicago v. Robbins*, the case Mr. Justice DAVIS was considering, the contractor made at an agreed price, an excavation, or pit, in the sidewalk of a public street, for area lights, and his servants left the pit insecurely covered, and the mischief complained of was the result. Now, upon principle, what conceivable difference is there in the two cases? None that we can perceive; for, if negligence there was, it was in each case, the negligence, not of the owner or proprietor, but of the servant of the contractor, for which the contractor and not the owner of the property was liable. But, says Mr. Justice DAVIS, the teamster when he placed the boards in the street, was engaged in a work collateral to that which the owner contracted for—the repair of the building—and that, in no sense could the injury be said to result from doing defectively that which the owner directed to be done, and that the owner was correctly held not liable. This reasoning is plainly fallacious. If the leaving the boards in the street was a work collateral to that which the owner let to the contractor, by reason whereof the owner was exempt from liability, the same was essentially true of the act of the servants of the contractor, in the case Mr. Justice DAVIS was deciding, in leaving the pit dug in the street for area lights, uncovered and unguarded. In each case a dangerous obstruction was placed in a public street, and in each the result was injury to a third person. The obstructions thus created could be said to differ only in degree. But what possible difference could it make to a man whether an injury received by him was the result of leaving a pile of boards or other material in a public street, or was the result of leaving a hole or pit therein, for area lights, uncovered and unguarded? If, on principle, there is any difference, we fail to perceive it. It is, therefore, manifest that, as in each case the mischief resulted from the act of the servants of the con-

tractor, it necessarily follows that in each the owner or proprietor should have been held not liable, as it was not pretended that the work let to contract in either case was unlawful.

And Mr. Justice DAVIS, in commenting on the case of *Scammon v. The City of Chicago*, says: "*Scammon v. The City of Chicago*, is similar in many of its facts to the case he had under consideration, *The City of Chicago v. Robbins*, and is decided differently." And advertng to the decision of the supreme court of Illinois in that case, he says: "This court held, as we do, that if the nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable; but if it is from the negligence of the contractor or his servants, then he should alone be responsible. But the court also held that the omission to cover the opening in the area did not necessarily occur as an incident to the prosecution of the work, a rule to which we cannot assent, and which we think is opposed to reason and authority."

Thus, in plain and unequivocal terms, Mr. Justice DAVIS states his only ground of dissent from the decision in *Scammon v. The City of Chicago*. It is only that the Illinois court held that, "The omission to cover the opening in the area did not necessarily occur as an incident to the prosecution of the work," and this, and this only, was the ground of dissent. The ruling dissented from is in exact accord with the numerous cases hereinbefore referred to and relied upon, and is sound upon principle, as well as sustained by ample authority. Upon what conceivable principle, we ask, can it be said that the negligence of a servant of an independent contractor in the prosecution of a work which in itself is lawful, is a necessary incident to such work? To hold any such doctrine would be, in effect, to hold, as was the case in *Hale v. Sittingbourne & S. R. Co.*, *supra*, that to let work to a competent and skillful contractor is, in effect, tantamount to an assumption, on the part of the employer or owner, of responsibility for all injuries resulting from the carelessness of the contractor, his agents or servants. In other words, it would be to hold that in letting to contract a lawful work, the contractee, owner or proprietor becomes necessarily responsible for every unlawful or careless act done by the contractor or his servants in the prosecution of such work. To uphold any such doctrine would be unjust and oppressive, and opposed to both principle and authority.

We have thus compared the two English cases—*Hale v. Sittingbourne & S. R. Co.*; and *Butler v. Hunter*. Upon both principle and authority we feel constrained to reject the doctrine laid down in the former and to approve that in the

latter case. So, as to the two American cases—*Scammon v.*

Result of
comparison.

The City of Chicago and *City of Chicago v. Robbins*. We can but approve the decision in the former, as resting well on principle and authority while we reject the latter as opposed to both. We may safely venture the remark, that a careful examination of all the authorities, American and English, will show that all the decisions, which like *Hale v. Sittingbourne & S. R. Co.*, and *City of Chicago v. Robbins* are opposed to the conclusion arrived at in the present case have an obvious leaning towards the unjust and oppressive doctrine held in the old English case of *Bush v. Steinman*, *supra*, which was long ago repudiated in both England and this country.

But in the present case, the plaintiff relies with confidence on the case of *The City of Chicago v. Robbins*, *supra*. That

City of Chi-
cago v. Rob-
bins distin-
guished.

case however, can have no application to the case in hand, as in addition to what has already been said, the judgment therein was distinctly placed upon the ground that the work, which was left unguarded, became a nuisance. In the course of his opinion in that case Mr. Justice DAVIS said: "This area when it was begun was a lawful work, and if properly cared for it would always have been lawful; but it was suffered to remain uncovered, and thereby it became a nuisance, and the owner of the lot for whose benefit it was made is responsible." This is just the principle upon which the judgment proceeded in *Bush v. Steinman*. But however this may be, the language of the judge above quoted, shows that the judgment was put upon the ground that work which was lawful in its inception, became a nuisance, and that upon that ground the owner of the property was held liable.

It was not pretended in the present case, that the work in question was unlawful, or that from any cause, it became at

Contractor
and not de-
fendant re-
sponsible for
Bibb's death.

any time a nuisance; so that the case of *The City of Chicago v. Robbins* can have no application whatever. As was said by Baron ROLFE, in *Hobbit v. London & N. W. R. Co.*, *supra*, the wrongful act here could not in any sense be treated as a nuisance. It was one single act of negligence, and that was the inopportune careless act of Englesby, the agent or servant of Smith, the contractor, in ordering the signal to be given for the train to pass over the bridge when it was unsafe; when had he waited, it may have been a very short time, all would have been well; but he did not wait, and his grossly negligent act was the sole cause of the disaster which followed; and for that negligent and careless act, which resulted so fatally to the plaintiff's intestate, Smith, the con-

tractor is responsible and not the railroad company; for, as between the said contractor and Englesby his foreman, who was the real author of the mischief, the relation of principal and agent or master and servant did exist, and upon the principle *qui facit per alium facit per se* Smith, the master alone is responsible. As between Smith, the contractor, and the plaintiff's intestate, Bibb, the relation of master and servant also existed. Bibb was employed and paid by Smith, and bound to receive and obey his orders; he owed no special duty to the railroad company, nor did the latter owe any such duty to him; the company never by contract, express or implied, undertook to look after and protect him against injury, nor had he any right to look to it for the performance of any such duty. He, the plaintiff's intestate stood in the shoes of his master, who was Smith, the contractor, and was entitled at the hands of the company to no other or higher duty than was due from it to Smith. There is no evidence nor is it pretended that the railroad company was guilty of negligence or carelessness in the matter of running its train on the bridge after the signal was given to cross. On the contrary it is a fact certified that the train was moving at the rate of three or four miles per hour—a rate of speed not exceeding that of an ordinary pedestrian on a common country road.

In the light of the facts certified, and the principles of law applicable thereto; it is obvious that the rule *respondet superior* has no application in the present case. The relation of master and servant did not exist between the railroad company and Smith, the contractor, by the negligent or wrongful act of whose agent or servant the injury was occasioned. It is therefore obvious that in no possible sense can it be said that the railroad company stood in the relation of master to either Smith, the contractor, or his foreman, Englesby. The facts of this case incontestibly show, that Smith was an independent contractor in the broadest sense of the term. He was moreover, an engineer of good standing; that he followed an independent calling, had had extensive experience in the construction and erection of iron bridges, and was a professional and practical bridge builder of high repute, and had recently erected several very important bridges for the defendant company; that he contracted to build the bridge in question according to plans and specifications previously agreed on; that in its construction, he selected, employed and paid his own workmen, who were subject to his orders only, and he was to receive a fixed price for the work complete; and that, while the company's chief engineer and his assistants, had a

Smith was an
independent
contractor.

right to criticise both the methods and the workmanship, they did not have the right to direct the methods to be employed by the contractor in the erection of the bridge. There is therefore no possible sense in which it could be said that the relation of master and servant existed between the railroad company and the contractor or between it and Englesby, the agent or servant of the contractor; and in the absence of such relation there can be no liability on the company.

Yet it is strenuously contended on behalf of the plaintiff in error, that Smith was not an independent contractor, but simply an agent or servant of the railroad company and that the latter is responsible for the negligent and wrongful acts of Smith, his agents or servants in the prosecution of the work; it being claimed that it was the duty of the company to protect the plaintiff's intestate against the consequences of the negligent and wrongful acts of Smith or his agents or servants, by refusing to run its trains upon the bridge when it was in an incomplete and dangerous condition, although the signal for the train to pass over the bridge was given in obedience to the order of Englesby, Smith's foreman, and in accordance with the right reserved to Smith in the contract that such signals should be given by Englesby's orders.

This broad proposition embraces all others, of minor importance, asserted by the plaintiff in error, and is directly in conflict with the conclusion at which we have arrived and with the numerous authorities, American and English, cited in support of that conclusion. The contention is attempted to be upheld by assuming that the maxim *qui facit per alium facit per se*, and the consequential rule of *respondet superior*, apply to the facts of this case. The rule of *respondet superior* is simple and easily understood, though the decided cases show much diversity of opinion in its application, which, it seems, might, to a great extent, have been avoided. Doubtless, however, this diversity is not traceable to any intricacy or uncertainty in the rule itself, or to any doubt of its correctness, but is due to the great variety and intricacy of the facts in respect to which its application has been invoked, and the yet greater difficulty in determining, in many cases, whether or not the relation existed to which the rule is applicable. Hence, in *Milligan v. Wedge*, *supra*, the remark of WILLIAMS, J., that "The difficulty always is to say whose servant the person is that does the injury; when you decide that the question is solved."

In applying the rule of *respondet superior*, it is of the most importance that it be not extended beyond the reason upon which it is founded. By the plain import of its terms, the

Smith not
the agent
of defendant.

rule belongs to the relation of superior and subordinate, and is applicable to that relation wherever it exists, whether between principal and agent, or master and servant; and where that relation does not exist there can be no ground for the application of the rule. In the present case, it has been shown beyond question that the person who occasioned the injury was the agent or servant of the contractor, and not of the railroad company, and that the latter cannot in reason or justice be held liable.

Application of
rule respon-
dent superior.

The proposition that, in the present case, Smith was not an independent contractor, but simply the agent or servant of the company, rests on several grounds of contention. Let us now briefly examine them:

I. It is contended that the right reserved by the railroad company to run its trains over the bridge during its construction destroyed the independency of the contractor's employment. Under the circumstances of this and like cases, this proposition is without sanction of either reason or authority, and must be rejected as opposed not only to reason and justice, but to sound legal principles, almost, if not quite, universally recognized. The obvious vice that lies at the very root of the contention is, that it ignores the indisputable fact that Smith was an independent contractor, employed and paid his own workmen, who were subject to his orders only, and that he stipulated for and was to receive a fixed price for the work complete; ignores the plain and universally recognized distinction between the relation of contractor and contractee and that of principal and agent, or master and servant, and rests solely upon the novel assumption that the reservation of the owner or proprietor of any use or enjoyment whatever of the property on which the work let to contract is to be done, necessarily destroys the independency of the contractor's employment. In other words, that a railroad company or private individual, cannot, in the one case, build its road or other structures, or repair either, and in the other, the owner of property cannot build a house thereon, or repair one, by the intervention of an independent contractor, without the entire surrender of the possession and use of the property to such contractor; and that if such surrender be not made, then the employer is liable for any injury to another resulting from the negligent or tortious act of any agent or servant of the contractor. The recognition of any such principle would not only lead to the most absurd results, but would be to foster gross injustice and oppression. The fallacy of the proposition is well illustrated by an incident that occurred during the argument of the case of *Reedie v. Lon-*

Effect of com-
pany reserv-
ing right to
run trains
over bridge.

don & N. W. R. Co., *supra*, when Platt, B., put to counsel the following question: "Suppose the occupier of a house were to direct a bricklayer to make certain repairs to it, and one of his workmen, through his carelessness, were to let a brick fall upon a passer-by, is the owner liable? This was a very pertinent question; and the decision of that case answered it in the negative.

In every such case, the question is, not whether the owner or proprietor retained any use of the property during the erection of the work, but who had the *efficient control* of the work contracted to be done. Such control, in cases like the present, is necessarily with the contractor; and were it otherwise, independent employment would be degraded, its reliability in a great measure destroyed, and the general efficiency of railroad service correspondingly impaired. Hence the books teem with decided cases in which defendants were held not liable for torts committed on their premises by contractors or their agents or servants, although there had not been an entire surrender of the possession of the premises to the contractor. Such was the case in *DeForest v. Wright*, 2d Mich. 368, where a grocer hired a drayman to haul salt to his store; in *Forsyth v. Hooper*, 11 Allen (Mass.), 419, where a bell founder employed a person to hoist some bells into a church; see also *Harrison v. Collins*, 86 Pa. St. 153, and *McCarthy v. Second Parish of Portland*, 71 Me. 318.

In point of fact, the proposition contended for rests, in effect, upon the unwarranted assumption that the contractor's foreman, Englesby, whose negligent act caused the injury, had, at one and the same time, two masters—the Railroad Company and Smith, the contractor. The proposition that the rule of *respondet superior* is applicable only to the immediate superior of the person who does the injury, and that there can be but one such responsible superior, were clearly recognized in the leading cases of *Reedie v. London & N. W. R. Co.*, and *Blake v. Ferris*, *supra*. In *Langher v. Pointer*, *supra*, LITLEDALÉ, J., puts his opinion, that the owner of the carriage was not liable for the injury to a third person, by the negligent driving of the servant of the stable keeper, expressly on the ground that the driver could not be the servant of both the livery stable keeper and the person riding in the carriage; and he adds, that he "was the servant of one or the other, but not the servant of one *and* the other; that the law did not recognize a several liability in two principals."

II. It is contended that the defendant's company, in its contract with Smith, reserved a degree of control over the

Question is
who had con-
trol of work!

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but one re-
sponsible su-
perior.

work to be erected, which is inconsistent with the idea that Smith was an independent contractor. This contention cannot prevail. In Thompson on Negligence, p. 913, it is said: "The mere fact that the proprietor retains a general supervision over the work, for the purpose of satisfying himself that the contractor carries out the stipulations of his contract, does not make him responsible for wrongs done to third persons in the prosecution of the work—as where a railway employs an engineer to superintend the progress of the construction of its road and to see that the work is done according to contract." The author then cites, *per contra*, the case of Schwartz v. Gilmore, 45 Ill. 455, and adds: "This, however, is not the sound view of the usual building contract. The contractor stipulates to deliver to the proprietor certain results. He is responsible to the proprietor for these only. The proprietor does not retain control over the contractor as to his methods of proceeding with the work. He could not do so; for the contractor is generally skilled in the business and he is not. No contractor could safely stipulate to do a job at a fixed price, and then allow the proprietor to control him in matters of methods and detail; for this might destroy his power so to order the work as to make his contract a profitable one." Accordingly it has been held that a contract between a municipal corporation and a contractor for the construction of a sewer, containing the provision,—'all work to be commenced and carried on, at such times and such places and in such manner as the engineer shall direct,' and requiring the contractor to dismiss from his employment all incompetent and unfaithful persons, did not reduce the contractor to the grade of a servant of the city and make it answerable for his negligence. See *Erie v. Caulkins*, 85 Pa. St. 247; *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475; *Sherman and Redfield on Negligence*, §§ 78-81. See also *Park v. Mayor of New York*, 8 N. Y., p. 227, and *Kelly v. Mayor of New York*, 11 N. Y. 432, which strongly sustain the same view. These views are sustained by a great number of well considered cases, only a few of which, in addition to those already referred to, need be cited. See *Reedie v. Ry. Co.*, *supra*, *Berry v. St. Louis*, 17 Mo. 121; *Callahan v. Burlington & M. R. R. Co.*, 23 Iowa, 562; *Allen v. Willard*, 57 Pa. St. 374; *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17; *Eaton v. European & N. A. R. Co.*, 59 Me. 520; *Tibbetts v. Knox & L. R. Co.*, 62 Me. 437; *Samuelson v. Cleveland Iron Min. Co.*, 49 Mich. 164. The last named case is a complete refutation of the claim in the present case, that the right of inspection carried with it the duty of rejecting all improper workmanship. In that case, the de-

Effect of defendant retaining some control.

fendant, the owner of an iron mine, contracted with certain persons to work it, but stipulated that the contractors and not the owner should be responsible for any injuries to workmen, and the responsibility was assumed by the contractors. The mine was in proper condition when the contractors took possession; but the contract contained a stipulation, that when the contractors repaired the mine it should be done under the supervision, advice and control of the defendant's superintendent. In delivering the opinion of the court, and commenting on this provision, Judge COOLEY, among other things, said: "But the supervision does not make the owner principal in the mine, or master in the working of it. The owner assumes toward no one the duty to supervise; he does not stipulate to supervise; he only contracts for the privilege. If the mine owner in this case had dismissed the superintendent and sent no one to inspect the working, no miner could complain that a duty owing to him was being neglected. The company had not promised to protect him, or to indemnify him for injuries; on the contrary, it had expressly stipulated that it would assume no such responsibility. The privilege of intervention for its own protection was reserved; but the neglect of one's own interest is no wrong to others. Legal wrongs must spring from neglect of legal duties;" citing as in point, *Reedie v. London & N. W. R. Co.*, 4th Exch. 244, before referred to.

This view of Judge COOLEY is precisely appropriate to the case in hand--so much so that comment is unnecessary. The

Defendant
not the
master of
contractor's
workmen.

injury in that case was to an employe of the contractor, and the same is true in the present case. But in this case, it is a singular fact, that while it is assumed that Englesby, whose negligent and careless act caused the injury, was the servant of the railroad company, yet every authority relied upon presents the case of an injury to a *third person*; not a single case is cited by the plaintiff in which the injury was to an employe of the contractor. Obviously, if as insisted, the railroad company owed to the plaintiff's intestate the duty of protecting him against injury, it could be on no other ground than that the relation of servant and master existed between them; but it is perfectly clear that no such relation existed. It is equally clear that as the servant of Smith, the plaintiff's intestate did stand in the relation of servant to him and as the second person in the contract for services to be rendered by him. It is clear, therefore, that the plaintiff's intestate was not a *third person*, or a stranger, either in respect to the railroad company or Smith, the contractor, but was simply one of the two persons to the contract for service between the

contractor and himself. Hence, the authorities respecting injuries to *third persons* can have no application to his case. There was no contract relation, express or implied, between the railroad company and the employes of the contractor, or either of them; and as between said company and the plaintiff's intestate there was no relation whatever, other than that which springs from the common bond of society, as expressed in the maxim *Sic uteri tuo ut alium non lædes*, which imposes upon every man the duty of so using his own as to do no injury to his fellow man. It can in no just sense be said that the railroad company violated this rule; for it is pretended even that the injury was the result of the careless manner in which the company ran its train on the bridge. On the contrary, it is certified that the company exercised due care in the selection of the material furnished, and that it was sufficient for the purposes for which it was intended: that the bridge gave way and fell because the sway braces, lateral braces and struts had not been put in position. And it clearly appears that the mischief was the result of the wrongful act of Englesby, the contractor's agent or servant, in ordering the signal for the train to pass in the then insecure condition of the bridge.

III. And it is also contended that there was an obligation imposed by law upon the railroad company to see that its track was safe, and that it cannot shift this obligation upon an independent contractor. If the plaintiff's intestate had been either a passenger on the ill fated train, or an employe of the company, then this insistence would have some show of reason; but he was neither, and he cannot avail himself of the principles applicable in either class of cases.

Defendant's
duty to have
safe track.

IV. But, among other things, it is certified that to run a train of coal cars upon such a bridge in such a condition, would be foolhardy; and this is fastened upon as a conclusive reason for holding the railroad company liable, and upon the express ground, that the defective and unsafe condition of the bridge was open and obvious and could and ought to have been seen by the company's assistant engineer, Maj. Goodwin, who was on the ground at the time, or just before the accident, and only three minutes before had left the bridge, passed to the rear of the train and was in the act of mounting onto the caboose to return to Lynchburg, when he heard the crash and desisted. Is it credible that he would thus have imperilled his life by attempting to ride over the bridge in the caboose attached to the very train under which the bridge fell, if the danger was open to common observation? We think not.

Contention
that the dan-
ger was an
obvious one.

The question whether the span which fell, was, in any particular stage of its progress, safe, was in the nature of things, one to be determined by Smith or his foreman, Englesby, by whom he acted. This is well illustrated by the correspondence between the parties, leading up to the contract in question. In a letter written by Smith to Chief Engineer Coe, dated Baltimore, December 9th, 1886, he says: "Replying to yours of the 1st inst., I write that during my late absence at St. Louis, my best draughtsman worked out the drawings for the removal of Big Otter Bridge, and when I came to checking them up, within a few days, I found that the premises assumed were a little out and a new study is required. This will probably delay matters a few days, etc." Now, was it competent for the assistant engineer, Maj. Goodwin, to interfere and delay the work until he could *study* the situation upon some theory of his own? Certainly not; for in the first place, he had no such right under the terms of the contract; and in the second place, any such interference could only have produced confusion and delay, and would have tended to involve his company in liability not contemplated by the contracting parties. It is clear that the danger was not open to common observation, and that the plaintiff's case has no support in the fact that it was foolhardy to run the train on the bridge in its insecure condition. The contractor, acting by his foreman, knew or ought to have known, the condition of the bridge. He reserved for his protection, the right to have the signals for the passage of trains given when his foreman, Englesby, so ordered. The signal was given in obedience to Englesby's order. The bridge was then unsafe: hence the disaster that followed, and for it, the contractor, Smith is alone liable.

This case has been argued for the plaintiff very much as if the plaintiff's intestate was a common day laborer and in the simplicity of his nature trusted to the railroad company for protection. The facts certified warrant no such conclusion but quite the contrary. In a telegram to Chief Engineer Coe, dated Baltimore, January 13th, 1887, Smith says: "Foreman reports James River bridge finished, and he awaiting orders with his gang in Lynchburg. Shall I order them up to Otter or Ivy Creek at once." On the next day, he says to Engineer Coe: "I will send Englesby and gang to Harrisonburg if you decide to postpone the trestling as suggested." On another occasion he spoke of them as "my erectors." Now, considering the character of work in which Smith was engaged in connection with the terms used in respect to his workmen,—such as "Englesby and his gang," and "my erectors," the

Deceased not
an inexperienced
laborer.

reasonable inference is that the plaintiff's intestate was one of the gang—one of the erectors, and that they were all trained hands in the art of bridge erection.

It may be stated in general that companies constructing railroads and cities constructing public works in the performance of corporate duties have again and again been held exempt from liability for the negligence of contractors, and sub-contractors, or their agents or servants. In addition to the authorities already referred to in support of this proposition, only a few more need be cited. See *King v. New York Cent. & H. R. R. Co.*, 66 N. Y. 182; *Gosham v. Gross*, 125 Mass. 232; *Cunningham v. International R. Co.*, 51 Tex. 503; *Painter v. Mayor of Pittsburg*, 46 Pa. St. 221; *Steel v. South Eastern R. Co.*, 16 C. B. 550; *Clark v. Vermont & C. R. Co.*, 28 Vt. 297; *Callahan v. Burlington & M. R. R. Co.*, 23 Iowa, 562; *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17; *West v. St. Louis & V. & T. H. R. Co.*, 63 Ill. 545; *Tibbitts v. Knox & L. R. Co.*, 62 Me. 437; *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178.

Further
analogous
authorities.

In the last named case, it was held :

1st. That a railroad company which had let by contract the entire work of constructing its road, and had no control over those employed in the work, was not liable for injuries to a third person, occasioned by the negligent acts of those employed in doing the work, such as blasting in a manner to throw rocks upon the lands of another.

2d. That a party is not chargeable with the negligent acts of another in doing work upon his lands, unless he stands in the character of employer to the one guilty of the negligence, or unless the work as authorized by him would necessarily produce the injuries complained of, or they are occasioned by the omission of some duty incumbent upon him.

3d. That there is no distinction in this respect between an owner of real and of personal property, and the former is held to no stricter liability for his negligent use and management of his real estate, or of negligent acts upon it by others, than is the latter as to a similar use of his property.

Such is the true doctrine, and we adopt it as the only doctrine justly applicable to the present and all similar cases. There is, therefore, no just ground upon which the plaintiff in error, the plaintiff below, can base a right of recovery in the present case. We are of opinion that there is no error in the judgment of the court below. As all other questions raised are dependent upon that raised by the plaintiff's first and most material bill of exceptions, which has been very fully considered, and as the determination thereof on the facts and law of the case, will

Judgment
affirmed.

probably operate as a final disposition of the case itself, we deem it unnecessary to consider the questions raised by other exceptions of minor importance. The judgment of the court below is correct, and must be affirmed.

Liability of Railroad Company for Tort of Independent Contractor.—See *ante* Atlanta & Florida R. Co. v. Kimberly, and note, p. 307, 315.

Who are Independent Contractors.—See Rogers v. Florence R. Co. (S. Car.), 39 Am. & Eng. R. Cas. 348, note 354; note 44 *Id.* 653.

STEWART CHUTE LUMBER CO.

v.

MISSOURI PACIFIC R. CO. *et al.*

(*Nebraska Supreme Court, Sept. 22, 1891.*)

Mechanic's Lien—Material Furnished Railroad Contractor.—Lumber sold to a subcontractor on a railway, for the erection of shanties for his employes and stables for his teams, is not within the statute granting a lien for labor performed or material furnished in the construction, repair, and equipment of the railroad, and gives no right of action against the railway company. *Stewart Chute Lumber Co. v. Missouri Pac. R. Co.*, 28 Neb. 39, 39 Am. & Eng. R. Cas. 566, overruled. COBB, C. J., dissenting.

ON rehearing.

MAXWELL, J.—An opinion was filed in this case in 1889, which is reported in 28 Neb. 39, 39 Am. & Eng. R. Cas. 566, the judgment of the court below being reversed.
Case stated. and judgment entered in this court for the plaintiff. As that decision was rendered by a divided court, a motion for a rehearing was sustained, and the cause is again submitted to the court.

The facts, in brief, are these: One Marcus Cavanaugh was a subcontractor on the Missouri Pacific Railway in the construction of that road from Weeping Water to Lincoln, and purchased from the plaintiff building material to the amount of \$296.19, for the construction of shanties for the persons employed by him on his subcontract, and also for the construction of stables for the teams used by said employes in grading the road. The shanties and stables had no connection whatever with the railway. Under this state of facts, can the plaintiff enforce its claim against the railway company for the amount of Cavanaugh's debt? Section 1, art. 2, chap.

Statutory provision. 54, Comp. St. provides "that whenever any laborer upon any railroad, canal, viaduct, bridge, ditch, or other similar improvement in this state shall have just claim or demand for labor performed on any such rail-

road, canal, bridge, ditch, viaduct, or other similar improvement against any person or persons who are, or any company which is, a contractor on such railroad, canal, viaduct, or bridge, or against any person or persons who are subcontractors with any person or persons or company contracting with any such railroad, bridge, viaduct, or ditching company for the construction of any part of such railroad, bridge, canal, viaduct, or ditch of any such company, every such railroad, canal, bridge or ditch company shall be liable to pay such laborer the amount of such claim or demand, with 10 per cent. interest thereon: provided, such laborer shall have given notice within sixty days after the last item of labor shall have been performed that he or she has such claim or demand. Such notice shall be given in writing, and shall specify the peculiar nature and amount of the claim or demand, and shall be delivered to the president or vice-president, superintendent, agent, or the managing director or chief engineer of any such company, or to the engineer in charge of that portion of the work, or any portion of the railroad, canal, viaduct, bridge or ditch upon which such labor is performed.

Sec. 2. When material shall have been furnished or labor performed in the construction, repair, and equipment of any railroad, canal, bridge, viaduct, or other similar improvement, such labor and material man, contractor, or subcontractor shall have a lien therefor, and the said lien therefor shall extend and attach to the erections, excavations, embankments, bridges, roadbed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging, all of which, including the right of way, shall constitute the excavation, erection, or improvement provided for and mentioned in this act." The lien is given for material which "shall have been furnished or labor performed in the construction, repair, and equipment of any railroad."

These words do not include lumber, material, or labor which was not performed or furnished in the construction, repair, or equipment of the road. If this were not so, there would be no limit to the liability of a railway company. If, by a strained construction of the statute, the company is held liable for material used for shanties, it would, by the same rule, be liable also for food and clothing for the employes, and feed for the teams; and it would be difficult to tell where its liability would cease. The lien is created by statute, and, independently of that, no cause of action exists against the company. The question here presented was before the supreme court of Michigan in

Company not
liable

Dudley v. Toledo, A. A. & N. M. R. Co., 65 Mich. 655, 30 Am. & Eng. R. Cas. 236, and it was held that debts incurred for the board and clothing of hands employed in constructing the railroad, and feed for teams used in that business, do not come within the provisions of the statute, and cannot be enforced against the railway company. That decision, in our view, is correct. It follows that the judgment heretofore rendered by this court is reversed, and the judgment of the court below affirmed.

NORVAL, J., concurs.

COBB, C. J., dissents, for reasons stated in his former opinion.

Liens for Materials Supplied to Contractors for the Construction of Railroads.—In a note to the report of this case on the original hearing, 39 Am. & Eng. R. Cas. 575, the decision of the Nebraska court was shown to be in direct conflict with a line of well considered cases, and to be wrong in principle. It is satisfactory to observe that the supreme court of Nebraska has at length overruled its former erroneous decision and is now in line with the other courts.

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— in case of, *prima facie* case of negligence is made out and burden of proof is on company. *Southern Kan. R. Co. v. Walsh (Kan.)*, 493.

— Presumption of negligence arises from proof of accident. *Alabama G. S. R. Co. v. Hill (Ala.)*, 501.

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— Condition of track over which train had to pass to reach place of accident, may be shown. Evidence as to condition of track six months after accident. *Jacksonville & S. E. R. Co. v. Southworth (Ill.), 513 n.*

— Exclusion of question as to whether there was subsequent accident at same switch, held harmless error. *Grant v. Raleigh & G. R. Co. (N. Car.), 513 n.*

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— may be recovered, where injury was caused by rotten ties and old rails, showing gross negligence. *Alabama G. S. R. Co. v. Hill (Ala.), 501.*

— not recoverable for injury caused by defective track, unless defendant was probably conscious that accident was likely. *Richmond & D. R. Co. v. Vance (Ala.), 512 n.*

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—train moving at the rate of six miles an hour. Passenger run over by train on another track, cannot recover. Dewald *v.* Kansas City, F. S. & G. R. Co. (Kan.), 557.

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—moving train. Boy jumping from train to avoid being carried past destination. Action by parents. Negligence in the care of child. Avey *v.* Galveston, H. & S. A. R. Co. (Tex.), 565 *n.*

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—moving train. Starting train before passenger has time to alight. Leggett *v.* Western N. Y. & P. R. Co. (Pa.), 563 *n.*

—moving train under failure of train to stop at station, does not justify hazardous attempt to alight. Little Rock & F. S. R. Co. *v.* Tankersly (Ark.), 564.

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—moving train; attempt, is contributory negligence is a matter of law. Jury properly instructed to find for defendant. Bacon *v.* Delaware, L. & W. R. Co. (Pa.), 541 *n.*

—moving train. Passenger cannot recover, unless he shows that there was no manifest risk and that train did not stop long enough to allow him to get on. Browne *v.* Raleigh & G. R. Co. (N. Car.), 544.

—moving train in proximity to projecting platform liable to cause injuries, held contributory negligence although attempt was made at direction of conductor. Hunter *v.* Coopers-town & S. V. R. Co. (N. Y.), 534.

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Getting on car before official announcement that it was ready ; contrary to regulation, which was not published or known. Passenger not guilty of contributory negligence. *Wester Md. R. Co. v. Herold* (Md.), 598 *n.*

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Protruding hand from window of moving train ; no recovery for injuries received. *Favre v. Louisville & N. R. Co.* (Ky.), 594.

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— Passenger must conduct himself with such caution as his position requires. *Olivier v. Louisville & N. R. Co.* (La.), 576.

— with knowledge of rule forbidding it precludes passenger from recovering for injury. *McCauley v. Tennessee C., I. & R. Co.* (Ala.), 580.

— of street car is not negligence *per se* although there may be room within. *Upham v. Detroit City R. Co.* (Mich.), 584 *n.*

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Indecent language used by passenger and refusal to pay fare, warrants his expulsion. *Louisville & N. R. Co. v. Johnson* (Ala.), 611.

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Leaving train. Passenger need not wait to be forcibly ejected, if conductor has ordered him to get off. He may leave and obtain redress for expulsion. *Georgia R. & B. Co. v. Eskew* (Ga.), 635.

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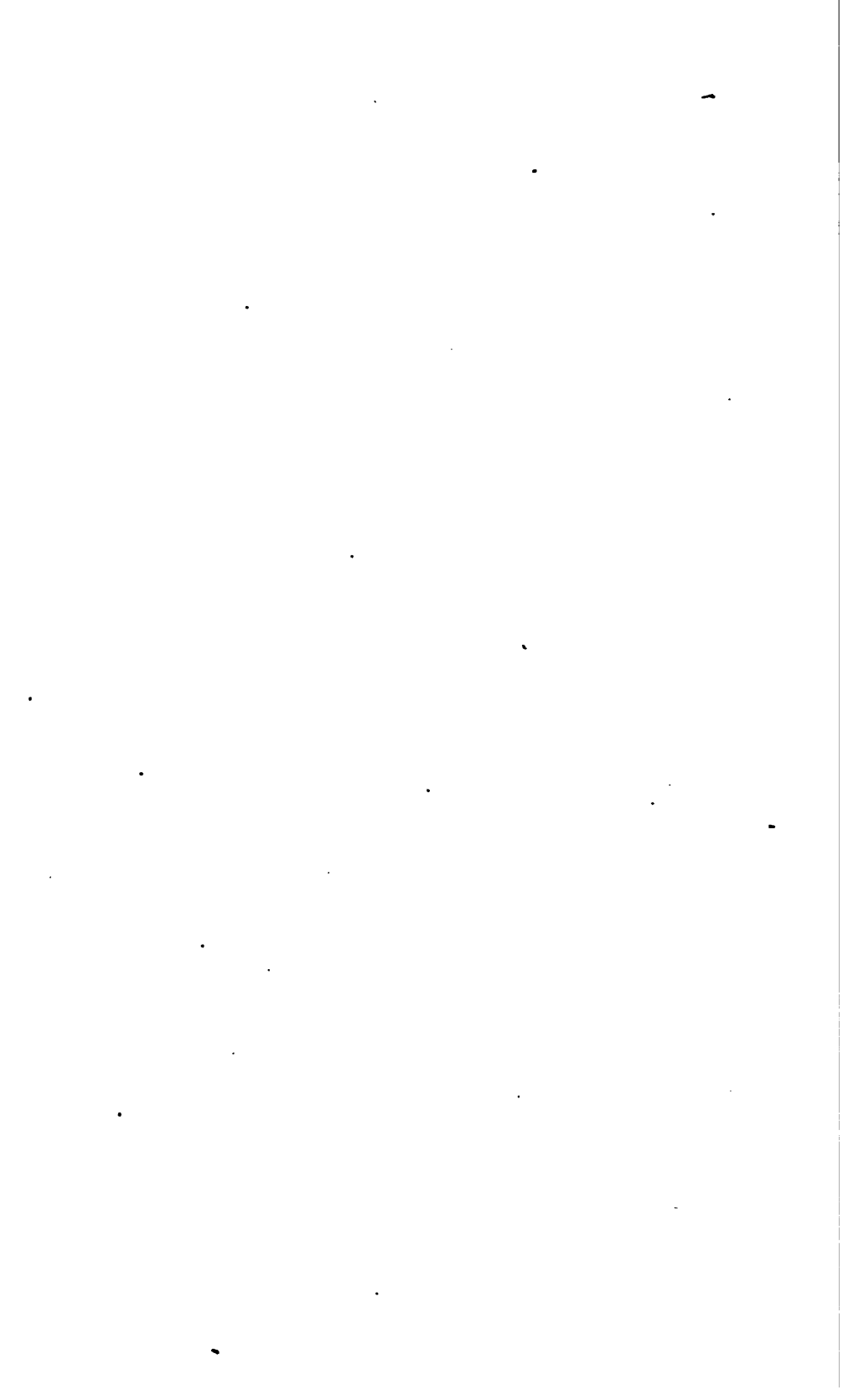
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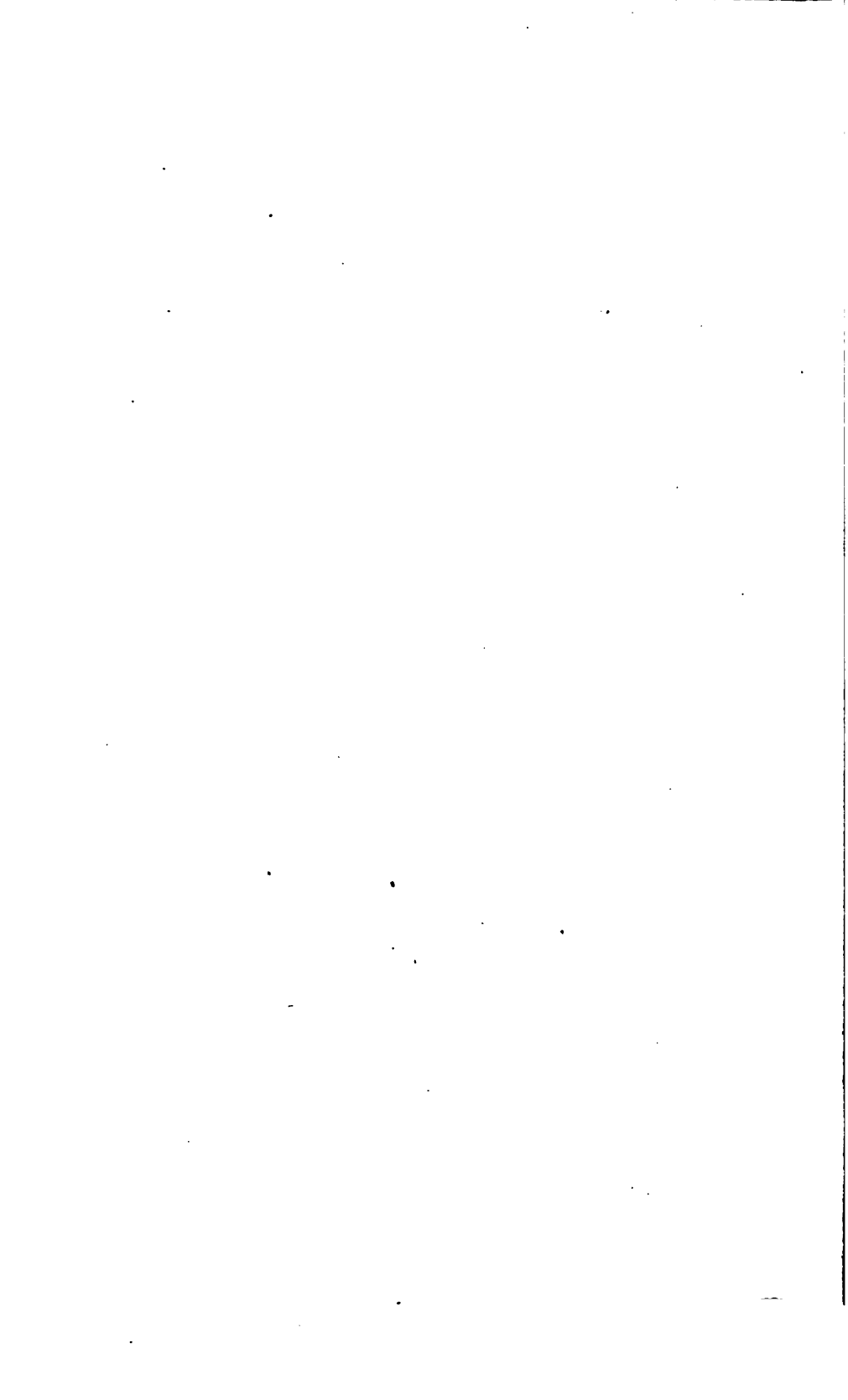
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